



EUROPEAN COMMISSION
DG Competition

***Case M.8536 - ATLANTIA / ABERTIS
INFRAESTRUCTURAS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 13/10/2017

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EUROPEAN COMMISSION

Brussels, 13.10.2017
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

To the notifying party:

Dear Sir or Madam,

**Subject: Case M.8536 – Atlantia/Abertis Infraestructuras
Commission decision pursuant to Article 6(1)(b) of Council
Regulation No 139/2004¹ and Article 57 of the Agreement on the
European Economic Area²**

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

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- (1) On 08 September 2017, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Atlantia S.p.A. ("Atlantia", Italy) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over Abertis Infraestructuras S.A. ("Abertis"), by way of a public offer announced by Atlantia on 15 May 2017 and authorised on 09 October 2017 (the "Transaction").³ Atlantia and Abertis are designated hereinafter as the "Parties".

1. THE PARTIES

1.1. Atlantia

1.1.1. Atlantia's activities

- (2) Atlantia, a company listed on the Italian Stock Exchange, is a holding company mainly active in the toll motorway concessions and airport infrastructure⁴ sectors.
- (3) With regard to toll motorway management in the EEA, Atlantia is active (i) in Italy, through in particular Autostrade per l'Italia S.p.A ("ASPI"), which manages approximately 3 000 km of toll motorways, and (ii) more marginally in Poland, through Stalexport Autostrada Małopolska S.A., which manages approximately 60 km of toll motorways.
- (4) In addition, Atlantia operates electronic payment systems, through Telepass S.p.A. ("Telepass"), and is active in the provision of intelligent transport systems,⁵ through Autostrade Tech S.p.A. ("Autostrade Tech").
- (5) Finally, Atlantia provides construction and maintenance works, through Pavimental S.p.A. ("Pavimental"), and engineering services, through Spea Engineering S.p.A. ("Spea"). Both companies mainly operate on an infra-group basis.

1.1.2. Control over Atlantia

1.1.2.1. Overview of Atlantia's pre- and post-Transaction governance structure

Pre-Transaction shareholding structure

- (6) With a stake of 30.25% of Atlantia's issued capital, Atlantia's main shareholder is Sintonia S.p.A. ("Sintonia"), a wholly owned subsidiary of Edizione Srl ("Edizione"). Edizione is an Italian holding company belonging to the Benetton family, with equity investments mainly in the following sectors: textiles and clothing, food and beverage, infrastructure and mobility services, real estate and agriculture. In particular, Edizione controls Autogrill S.p.A. ("Autogrill"), which

³ Publication in the Official Journal of the European Union No C 308, 16.9.2017, p. 19.

⁴ With regard to airport infrastructure management, Atlantia controls Aeroporti di Roma S.p.A., which manages Rome airports, and Aéroports de la Côte d'Azur S.A. in France.

⁵ Intelligent transport systems aim at making transport safer, more efficient and more sustainable by applying various information and communication technologies to all modes of passenger and freight transport.

is active in the provision of concession food services to travellers, notably on motorways.

- (7) Atlantia's other two main shareholders with a stake of more than 5% are (i) InvestCo Italian Holdings ("InvestCo"), also referred to as GIC PTE LTD, an investment company linked to the Singapore Government, holding a stake of 8.14%; and (ii) Fondazione Cassa di Risparmio di Torino ("CRT"), holding a stake of 5.06%. The remaining shares of Atlantia (56.55%) are floating on the stock exchange market.
- (8) Currently, no shareholders agreement is in place with respect to Atlantia.⁶

Post-Transaction shareholding structure

- (9) Atlantia's offer for the issued share capital of Abertis is based on a full cash consideration for each Abertis share tendered, with the possibility for the shareholders of Abertis to opt, in part or in full, for a Partial Share Alternative ("PSA").
- (10) Atlantia's exact shareholding structure post-Transaction will depend on how many of Abertis' shareholders will opt for the PSA.
- (11) In any case, Edizione will remain the main shareholder post-Transaction, having a stake ranging between [*estimation of Edizione's future post-Transaction stake*]. InvestCo will hold a stake of between [*estimation of InvesCo's future post-Transaction stake*] and CRT will hold a stake of between [*estimation of CRT's post-Transaction stake*].
- (12) Fundacion Bancaria Caixa ("Caixa"), Abertis' current main shareholder, may opt for the PSA. In such a case, it would acquire a stake in Atlantia of between [*estimation of Caixa's future post-Transaction stake*].
- (13) According to Atlantia, no shareholders' agreement is expected to be signed post-Transaction.⁷

Pre-Transaction governance

- (14) Atlantia's management and governance are conducted only by the Board of Directors. The procedure for the appointment of Atlantia's Board of Directors is set forth by Article 20 of its Articles of Association, which provides for a voting list mechanism. Lists of Directors can be submitted by shareholders or by the outgoing Board of Directors.
- (15) The rules governing the appointment of the Board of Directors are as follows: (i) 4/5 of the members are taken, in sequential order, from the list receiving the majority of votes; and (ii) 1/5 of the members is taken from the other lists that are not in any manner connected with the shareholders who submitted or voted the majority list.

⁶ The shareholders' agreement between Edizione, Mediobanca – Banca di Credito Finanziario SpA ("Mediobanca"), Sinatra sarl ("Sinatra"; a company owned by GS Infrastructure Partners), and InvestCo, was terminated in 2015.

⁷ Form CO, footnote 34.

- (16) The Board of Directors currently in charge (15 directors with a three-year mandate) was appointed for the 2016-2018 period at the shareholders' meeting of 21 April 2016. Two lists were submitted: one presented by Atlantia's main shareholder, Edizione, and another presented by a group of asset management companies and other institutional investors representing 2.33% of Atlantia's issued capital.
- (17) The list presented by Edizione prevailed with 61.6% of the shares attending the meeting, representing 49.3% of the issued capital. The list received notably support from Edizione, InvestCo and CRT. As a consequence, Atlantia's current Board of Directors is composed of 12 members belonging to Edizione's list, including the Chairman and the CEO, and three members belonging to the opposing list. Out of the 12 members of the Board of Directors appointed as part of Edizione's list, five work for Edizione, an additional one (the Chairman) is also Edizione's chairman, and one work for CRT.
- (18) Atlantia's Board of Directors takes decisions on the basis of the majority of the votes cast. In the event of a tie, the Chairman casts the deciding vote.

Post-Transaction governance

- (19) Similarly to the pre-Transaction situation, Atlantia's management and governance will post-Transaction be conducted by the Board of Directors, according to the current Articles of Association amended by the extraordinary shareholders' meeting held on 2 August 2017.
- (20) For a limited period of time (i.e. until the next appointment of Atlantia's Board of Directors, in 2019), the number of members of the Board of Directors will be increased by one or three additional members, depending on the level of acceptance of the PSA by Abertis' current shareholders.
- (21) The first Atlantia's Board of Directors to be appointed post-Transaction, i.e. in 2019, will again be composed of 15 members. Rules of appointment will be partially revised. In substance, while maintaining the voting list method, three lists are envisaged: (i) a "majority list",⁸ from which at least nine out of 15 members will be selected; (ii) a "minority list", from which three out of 15 members will be selected; and a (iii) a "significant minority list",⁹ from which three out of 15 members will be selected.
- (22) As to its functioning, Atlantia's Board of Directors will take decisions on the basis of the majority of the votes cast. Neither veto rights, nor other majority or supermajority rules will apply to any Board's decision. No member of the Board of Directors will enjoy a special or preferential position (e.g. casting vote or other prerogatives). Such regime will apply to all Board's strategic decisions.

⁸ Defined as the list that obtained the majority of the votes.

⁹ Defined as the list that received the largest number of votes among the lists presented by at least one shareholder with an individual stake of at least 10% of the issued capital.

1.1.2.2. Atlantia's views

- (23) Atlantia submits that it should be regarded as a non-controlled company for the purposes of the EU Merger Regulation, notably due to (i) the absence of a shareholders' agreement concerning Atlantia's governance; (ii) the existing possibility of switching majorities in Atlantia's shareholders' meetings; and (iii) the expected [...] post-Transaction of Edizione's stake, namely from 30.25% to [estimation of Edizione's future post-Transaction stake].¹⁰

1.1.2.3. Commission's assessment

- (24) Considering the powers of Atlantia's Board of Directors¹¹ and pursuant to the Commission Jurisdictional Notice ("CJN"),¹² the issue of control over Atlantia by Edizione amounts to whether Edizione has the power to ensure that its proposed list of Directors will likely obtain the majority of votes.
- (25) In view of Atlantia's shareholding (30% pre-Transaction and below 30% post-Transaction) and in the absence of specific rights attached to it, Edizione has not pre-Transaction and will not have post-Transaction *de jure* sole control over Atlantia.
- (26) In addition, considering the past and expected attendance rates at Atlantia's shareholders' meetings (approximately 80%), the level of Edizione's stake in Atlantia is insufficient to conclude that Edizione will have the absolute majority of the votes at Atlantia's shareholders' meetings.
- (27) Nevertheless, there are some elements that would point towards Edizione controlling Atlantia on a *de facto* basis, as referred to in paragraph 59 of the CJN.
- (28) First, Atlantia's other shareholders are and will remain widely dispersed post-Transaction, with the exception of InvestCo, CRT, and possibly Caixa. InvestCo, which is a financial investor, used to be bound by a shareholders' agreement with Edizione. As to CRT, one of its representatives was appointed by [...].
- (29) Second, at the three shareholders' meetings having occurred since the expiry of the shareholders' agreement (namely, on 21 April 2016, 21 April 2017 and 2 August 2017), [details on voting patterns].
- (30) Third, with its 30% shareholding and even after the end of the shareholders' agreement, Edizione has comfortably obtained the relative majority of the votes enabling it to appoint 12 out of 15 members of Atlantia's Board of Directors. It appears likely, or at least it cannot be excluded, that the same situation will persist post-Transaction. In fact, despite the (limited) dilution of Edizione's votes,

¹⁰ Form CO, paragraph 92.

¹¹ Article 27 of Atlantia's Articles of Association: "*The Board of Directors shall be vested with the widest possible powers to conduct the affairs of the Company*".

¹² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, p. 1. See in particular its paragraph 57: "*enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.*"

Edizione will remain by far Atlantia's largest shareholder and will possibly be able to rely on InvestCo's and CRT's support, as in the recent years (also after the expiry of the shareholders' agreement).

1.1.2.4. Conclusion

- (31) In view of the above, and considering all evidence available to it, the Commission considers that it cannot be ruled out that Edizione exercises *de facto* sole control over Atlantia and, therefore, that Atlantia and Autogrill belong to the same group.
- (32) In any case, for the purpose of this Decision, the question of whether Edizione controls Atlantia can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering Atlantia, through Autogrill, is active in the markets for the award of food services concessions and for the provision of concession food services (see sections 5.1.3 and 5.2.3 below).

1.2. Abertis

1.2.1. Abertis' activities

- (33) Abertis, a company listed on the Spanish Stock Exchange, is the parent company of a group operating in the toll roads and telecommunications infrastructure¹³ sectors.
- (34) With regard to toll motorway management in the EEA, Abertis is mainly active in the management of toll motorways in the following countries:
 - (a) in Spain, where it directly manages approximately [50-60]% of the Spanish toll roads, mainly through Acesa (Autopistas, Concesionaria Española, S.A.), Aumar (Autopistas Aumar, S.A. Concesionaria del Estado), Avasa (Autopista Vasco-Aragonesa, Concesionaria Española S.A.), Iberpistas (Ibérica de Autopistas S.A., Concesionaria del Estado), Aucat (Autopistes de Catalunya, S.A.), and Invicat (Infraestructures Viàries de Catalunya, S.A.) among others,
 - (b) in France, through in particular SANEF (Société des Autoroutes du Nord et de l'Est de la France, S.A.), including SAPN (Société des Autoroutes Paris-Normandie, S.A.), managing more than 1 760 km of toll roads in France (approximately [20-30]% of the French toll motorway network), and
 - (c) to a lesser extent in Italy, through A4 Holding Spa and its controlled concessionaire Autostrada Brescia Verona Vicenza Padova S.p.A, managing 235 km of toll motorway in Italy (approximately [0-5]% of the Italian toll motorway network).
- (35) Abertis also operates electronic payment systems, through Bip&Go SAS ("Bip&Go"), Bip&Drive S.A. ("Bip&Drive") and Eurotoll SAS ("Eurotoll"), and

¹³ With regard to telecommunications activities, Abertis operates in the satellite transmission sector through Hispasat, S.A., the Spanish satellite communications operator.

intelligent transport systems, through Emovis SAS ("Emovis") and A4 Mobility Srl ("A4 Mobility").

1.2.2. Control over Areamed

- (36) Abertis owns a 50% stake in Areamed 2000 S.A. ("Areamed"), a joint venture with Areas S.A. ("Areas"), a subsidiary of Elixor Group active in the provision of concession food services on motorways.

1.2.2.1. Overview of Areamed's activities and governance structure

- (37) Areas has been managing the service areas in some of the motorways managed by Abertis since 1969 in accordance with certain agreements. Areas and Abertis [*details concerning Areas and Abertis business relationships*].
- (38) [*details concerning Areas and Abertis business relationships*], Areas and Abertis created in 1999 Areamed as a joint venture with each holding 50% participation. They assigned to Areamed [*details concerning the JV obligations and number of facilities managed*]¹⁴ until the expiry of Abertis concession contract in 2021.¹⁵
- (39) Following such assignment, Areamed is active in the management of motorway service areas. However, Areamed [*details concerning the JV future business intentions*].¹⁶
- (40) According to the agreement between Areas and Abertis on the creation of Areamed, Areas is responsible for the day-to-day management of all service areas assigned to Areamed in accordance with the contract signed by both parties.

1.2.2.2. Atlantia's views

- (41) Atlantia submits that Abertis cannot be considered as being active in concession food services, since Abertis is not involved in the operational management of Areamed's activities related to concession food services.¹⁷

1.2.2.3. Commission's assessment

- (42) Even though Abertis is not involved in the day-to-day management of the service areas falling within the scope of Areamed, it is able to exercise a decisive influence over Areamed and to determine its strategic commercial decisions.¹⁸

¹⁴ Areamed's activities are located on the Acesa AP7 and AP2 concessions from Tarragona to La Jonquera and from Barcelona to Zaragoza, which are part of the motorway network managed by Abertis in Spain. The [...] service areas managed by Areamed include [...] food service outlets entrusted to Areas under a sub-lease contract (agreed minutes of a conference call with Areas of 31 August 2017, paragraphs 4-5).

¹⁵ Agreed minutes of a conference call with Areas of 31 August 2017, paragraph 7).

¹⁶ In Spain and other EEA countries, Areas bids alone for being granted concessions for the management of service areas (agreed minutes of a conference call with Areas of 31 August 2017, paragraph 6 and footnote 2).

¹⁷ Form CO, paragraph 172.

¹⁸ This was confirmed by Areas: "Abertis is fully involved in the strategic and operational decisions taken with regard to Areamed" (agreed minutes of a conference call with Areas of 31 August 2017, paragraph 10).

Those decisions are likely to include the entrusting or sub-contracting of motorway services (e.g. food, fuel, retail services) to Areas or third parties.

- (43) Therefore, there are indications that Abertis jointly controls Areamed together with Areas, including from an operational point of view, and has notably the ability to influence the activities entrusted by Areamed to Areas or third parties. As a consequence, Abertis could be considered as being active in the management of food services sub-concessions and the provision of concession food services to drivers, although indirectly (through its joint control over Areamed's activities in the management of motorway service areas, including of food services concessions).

1.2.2.4. Conclusion

- (44) In view of the above, and considering all evidence available to it, the Commission considers that it cannot be excluded that Abertis jointly controls Areamed, exercising a decisive influence over strategic decisions concerning its operations, including on the concession food services provided by Areas on motorway service areas managed by Areamed.
- (45) In any case, for the purpose of this Decision, the question of whether Abertis jointly controls Areamed's operations related, directly or indirectly, to concession food services can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering Abertis as active, through Areamed, on the market for the provision of concession food services (see sections 5.1.3 and 5.2.3 below).

2. THE TRANSACTION

- (46) On 15 May 2017, Atlantia published with the Spanish *Comisión Nacional del Mercado de Valores* ("CNMV") the first announcement of a voluntary public tender offer in cash and stock on the entire issued share capital of Abertis.
- (47) Pursuant to the prospectus setting out the detailed terms and features of the offer published on 09 October 2017,¹⁹ (i) the offer is conditional upon a minimum level of overall acceptance of 50% + 1 Abertis' total issued shares; and (ii) considering Abertis' rules of governance, the offer may lead to a change of control over Abertis.
- (48) Thus, the Transaction, pursuant to which Atlantia would acquire sole control over Abertis, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (49) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Atlantia: EUR [...];²⁰ Abertis: EUR [...]).²¹ Each

¹⁹ <https://www.cnmv.es/Portal/verDoc.axd?t={4cc03506-8dd2-43f3-94af-ff04b500360e}>

²⁰ Atlantia's turnover does not include Edizione's turnover. The inclusion of Edizione's turnover would not have an impact of the EU dimension of the Transaction, since (i) the turnover thresholds set out in

of them has an EU-wide turnover in excess of EUR 250 million (Atlantia: EUR [...]; Abertis: EUR [...]), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

- (50) The Transaction therefore has an EU dimension according to Article 1(2) of the Merger Regulation.

4. MARKET DEFINITION

- (51) Atlantia and Abertis are both integrated toll motorway concessionaires active in the EEA, notably in Italy, Spain, France and Poland, and worldwide. As a consequence, the Transaction mainly relates to (i) toll motorway concessions, as well as the provision of services ancillary to the operation of toll motorway facilities, related to (ii) concession food services, (iii) electronic toll systems ("ETS"), (iv) intelligent transport systems ("ITS"), and (v) construction.

4.1. Toll motorway concessions

- (52) In its prior decision practice regarding infrastructure services provided by licensed operators (e.g. airport services,²² rail services,²³ water supply and sewerage services²⁴), the Commission has held that competition essentially takes place (i) at the time where the license is granted by the public authorities (competition *for* the market); and (ii) whenever a licensed operator is subject to competition from substitutable alternatives (competition *in* the market). Therefore, the Commission has distinguished between the granting of a licence for the exploitation of a particular State-regulated infrastructure and the running of that particular infrastructure.
- (53) The Commission has applied such an approach to toll motorways and has defined two distinct markets: the market for the grant (or award) of toll motorway concessions and the market for the transport on toll motorways.²⁵

4.1.1. The grant of toll motorway concessions

4.1.1.1. Regulatory framework

- (54) This section describes the rules applicable to the grant of toll motorway concessions by public authorities, as determined by EU law or the law of EEA countries in which Atlantia or Abertis holds toll motorway concessions.

Article 1(2) of the Merger Regulation are met by Atlantia and Abertis alone; and (ii) Abertis does not achieve more than two-thirds of its aggregate EU-wide turnover within one Member State.

²¹ Turnover calculated in accordance with Article 5 of the Merger Regulation.

²² Case M.6862 – *VINCI/Aerportos de Portugal*, paragraphs 11-12.

²³ Case M.5855 – *DB/Arriva*, paragraph 68.

²⁴ Case M.567 – *Lyonnaise des Eaux/Northumbrian Water*, paragraphs 10-12.

²⁵ Cases M.7512 – *Ardian/Abertis/Tunels*, paragraph 19; M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 25; M.5974 – *Finavias/ Abertis/ Autopista Trados M-45*, paragraph 11; M.4687 – *Sacyr/ Eiffage*, paragraph 26; M.4249 – *Abertis/Autostrade*, paragraphs 15-17.

At EU level

- (55) The grant of high value concession contracts in the EU is governed by Directive 2014/23/EU (the "Concessions Directive").²⁶ Considering the investments required for the operation of a toll motorway concession, the award of toll motorway concessions in the EU is likely to fall within the scope of the Concessions Directive.²⁷
- (56) The Concessions Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, which aim at ensuring non-discrimination, fair access to markets and EU-wide competition for high-value concessions. In particular, they provide for the mandatory publication at EU level of a concession notice, including a description of the concession and the conditions of participating in the concession award procedure,²⁸ thus preventing the direct award of concession contracts without transparent competition.
- (57) The EU Member States had to transpose the Concessions Directive into their national legislation by 18 April 2016.

In Italy

- (58) Pursuant to the transposition of the Concession Directive by legislative decree No. 50/2016 (the "Code"),²⁹ toll motorway concessions are to be awarded pursuant to public tender procedure, on the basis of provisions consistent with those set out in the Concessions Directive.³⁰

In Spain

- (59) Pending the transposition in the Spanish legal order of the Concessions Directive, the grant of toll motorway concessions in Spain relies on Royal Legislative

²⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1-64.

²⁷ According to its (amended) Article 8, the Concessions Directive applies to concessions of a value equal to or greater than EUR 5 225 000. The value of a concession is defined as "*the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.*"

²⁸ Articles 31 and 33 of the Concessions Directive.

²⁹ Legislative decree No. 50 of 18 April 2016 on the implementation of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services as well as on the revision of the current rules on public contracts for works, services and supplies (*Decreto legislativo 18 aprile 2016, n. 50 - Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture*).

³⁰ Articles 164 and followings of the Code. In particular, Article 178 provides for specific rules concerning toll motorway concessions and require that new motorway concessions or those expired at the date of entry into force of the Code (i.e. 19 April 2016) be granted according to public tender procedures, unless the granting administration decides to carry out on its own or along with other public authority the management of a given motorway.

Decree 3/2011 (the "Public Sector Contracts Act").³¹ The latter defines the principles for the award of public contracts, including toll motorway concessions, aimed at safeguarding competition, such as transparency, equality of access to tenders and equal treatment without discrimination.

In France

- (60) The Concessions Directive was implemented into French law by Ordinance No. 2016-65 (the "Concessions Ordinance")³² and Decree No. 2016-86 (the "Concessions Decree").³³ In particular, concessions, notably for toll motorways, shall be awarded following a tender procedure,³⁴ based on equality of treatment, absence of discrimination, transparency and proportionality.

In Poland

- (61) The Act on concession contracts for construction works or services (the new "Concessions Act")³⁵ implements the provisions of the Concessions Directive into Polish law and requires granting authorities to carry out concession award procedures ensuring fair competition and equal treatment of economic operators, in line with proportionality and transparency rules.

4.1.1.2. Product market definition

Atlantia's views

- (62) Atlantia considers that the relevant product market should be defined as the market for the grant of toll motorways concessions.³⁶

Commission's assessment

- (63) In its prior decision practice, the Commission has defined the market for the grant of toll motorway concessions as consisting in the economic activity where supply is represented by the public administration and demand by undertakings or consortia of undertakings with an interest in acquiring the right to operate the toll motorway concessions.³⁷

³¹ Royal Legislative Decree 3/2011 of 14 November 2011 adopting the consolidated text of the Law on Public Sector Contracts (*Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público*).

³² Ordinance No. 2016-65 of 29 January 2016 relating to concession contracts (*Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession*).

³³ Decree No. 2016-86 of 1 February 2016 relating to concession contracts (*Décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession*).

³⁴ Except for concessions concluded between contracting authorities or entities within the public sector.

³⁵ The Act on Concession Contracts for Construction Works or Services of 21 October 2016 (*Ustawa z dnia 21 października 2016 r. o umowie koncesji na roboty budowlane lub usługi*).

³⁶ Form CO, paragraph 115.

³⁷ Cases M.7512 – *Ardian/Abertis/Tunels*, paragraph 21; M.4249 – *Abertis/Autostrade*, paragraph 15.

- (64) The majority of the respondents to the market investigation having expressed an opinion agree with the definition established by the Commission in its practice.³⁸ They notably insist on (i) the role of the State (or any other public authority or entity) as the owner of motorway infrastructure and, as such, as the grantor of motorway concessions, and (ii) the application of open competitive procedures for the selection of the grantees of motorway concessions.
- (65) Some respondents also refer to the existence of a secondary market for toll motorway concessions,³⁹ which Atlantia defines as the transfer of ownership and control over existing concessionaires.⁴⁰
- (66) The Commission notes that secondary transactions (i.e. the sale of concession holders by their shareholders and their acquisition by new shareholders) present some key differences from primary transactions, since (i) the public authority is in general not at the initiative of secondary transactions and, as a consequence, (ii) secondary transactions are not subject to the same regulatory framework (i.e. in the EEA, the Concessions Directive, as transposed into national laws).
- (67) Nevertheless, the Commission acknowledges that there is some degree of competition for the acquisition of existing concessionaires, which may involve companies also active in the market for the grant of toll motorway concessions by public authorities.
- (68) Therefore, while it is not necessary to decide on whether secondary sales represent a market, which would be distinct from the grant of motorway concessions, the Commission will also take account of the level of competition between Atlantia and Abertis at the time of secondary sales to assess the effects of the Transaction on the market for the grant of motorway concessions.

4.1.1.3. Geographic market definition

Atlantia's views

- (69) Atlantia considers that the market for the grant of toll motorway concessions could be regarded as having a worldwide dimension.⁴¹

Commission's assessment

- (70) In its prior decision practice, the Commission has left open the question of the geographic scope of the market for the grant of toll motorway concessions. While results of prior market investigations pointed to an at least EEA-wide market,⁴² the Commission did not exclude the possibility of delineating national markets.⁴³

³⁸ Replies to question 5 of Q1 – Questionnaire to customers and competitors; question 2 of Q2 – Questionnaire to granting authorities; question 3 – Questionnaire to trade associations.

³⁹ Replies to questions 5 and 6.2.1 of Q1 – Questionnaire to customers and competitors.

⁴⁰ Form CO, footnote 113 and paragraph 276.

⁴¹ Form CO, paragraph 129.

⁴² Case M.4249 – *Abertis/Autostrade*, paragraph 17.

⁴³ Case M.4687 – *Sacyr/ Eiffage*, paragraph 27.

- (71) In order to determine whether the market for the grant of toll motorway concessions is national or wider than national, in particular EEA-wide, the Commission has assessed the homogeneity of the conditions of competition across the EEA.⁴⁴
- (72) The Commission notes that the share of toll motorways managed by the Parties as well as the competitive landscape in the countries where they are present vary significantly from one EEA country to another. In particular, Atlantia is principally active in Italy, where it manages [50-60]% of the toll motorway network (in km), while Abertis manages only [0-5]% of the Italian toll motorway network. Conversely, in Spain, Abertis manages [40-50]% of the Spanish toll motorway network (in km) and its principal competitor is the Spanish group Itinere Infraestructuras ("Itinere"). In France, where Abertis manages [10-20]% of the toll motorway network (in km), the leading motorway concessionaire is the French group Vinci.⁴⁵
- (73) Nevertheless, the strength of domestic operators might be linked to the "weight from the past",⁴⁶ and be the result of the privatisation process of previously State-owned motorway companies, which had been directly entrusted with the management of toll motorways.
- (74) The discrepancies in the Parties' and their competitors' market shares would thus not necessarily indicate that the conditions of competition for the grant of toll motorway concessions are currently heterogeneous in the EEA.
- (75) In particular, the implementation of the Concessions Directive since 2016 has contributed to harmonising the rules for the award of motorway concessions at EEA level, thus to creating a level playing field in the EEA and overcoming existing barriers to an EEA-wide market for the grant of toll motorway concessions. This was confirmed by respondents to the market investigation having expressed an opinion, which, in their majority, consider that, from a regulatory point of view, the conditions of competition are homogeneous in the EEA (i.e. the rules for the grant of toll motorway concessions are similar in all EEA countries).⁴⁷
- (76) However, the views of respondents to the market investigation are split with regard to the homogeneity of the conditions of competition (i) from an economic or financial point of view (i.e. whether the levels of remuneration of motorway concessionaires are similar in all EEA countries or vary significantly from one EEA country to another),⁴⁸ (ii) from the point of view of the works / services included in the motorway concession (i.e. whether the works / services, e.g. management of the toll motorway and management of service areas, requested

⁴⁴ See Commission Notice on the definition of the relevant market, paragraph 8.

⁴⁵ Form CO, p. 71-73.

⁴⁶ See Commission Notice on the definition of the relevant market, paragraph 29.

⁴⁷ Replies to question 6.1 of Q1 – Questionnaire to customers and competitors; question 4.1 – Questionnaire to trade associations.

⁴⁸ Replies to question 6.2 of Q1 – Questionnaire to customers and competitors; question 4.2 – Questionnaire to trade associations.

from motorway concessionaires by the conceding authorities, are similar in all EEA countries or vary significantly from one EEA country to another),⁴⁹ and (iii) from the point of view of the duration of the motorway concession, which would significantly vary (e.g. from 20 to 75 years).⁵⁰

- (77) In addition, the market investigation is inconclusive as to whether, in the EEA, it is common for a non-domestic company to be granted a toll motorway concession (i.e. whether the toll motorway concession is commonly granted to a company established in a country different from the country of the toll motorway).⁵¹ Large concessionaires confirm that they are active EEA-wide, if not worldwide. Furthermore, international consortia are frequent. Nevertheless, some respondents point to the fact that the participation of a domestic company in a consortium is a competitive advantage, thanks notably to a better knowledge of the local market conditions.⁵²
- (78) Overall, there is no clear consensus among respondents to the market investigation having expressed an opinion as to whether (i) the conditions of competition for being granted a toll motorway concession are significantly different between EEA countries; or (ii) the conditions of competition for being granted a toll motorway concession are homogeneous in the EEA but different between the EEA and other parts of the world (e.g. Americas); or (iii) the conditions of competition for being granted a toll motorway concession are homogeneous in the EEA and worldwide.⁵³

4.1.1.4. Conclusion on market definition

- (79) In view of the above, the Commission considers that the market for the grant of motorway concessions is a relevant product market. For the purpose of this Decision, the question of whether secondary sales of motorway concessionaires constitute another relevant product market may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on that plausible product market.
- (80) In view of the above, there are indications that the market for the grant of toll motorway concessions is likely to be EEA-wide. However, for the purpose of this Decision, the question of whether the market for the grant of toll motorway concessions is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

⁴⁹ Replies to question 6.3 of Q1 – Questionnaire to customers and competitors; question 4.3 – Questionnaire to trade associations.

⁵⁰ Replies to question 6.4 of Q1 – Questionnaire to customers and competitors; question 3.4 – Questionnaire to granting authorities; question 4.4 – Questionnaire to trade associations.

⁵¹ Replies to question 6.6 of Q1 – Questionnaire to customers and competitors; question 3.6 – Questionnaire to granting authorities; question 4.6 – Questionnaire to trade associations.

⁵² Replies to question 6.6 of Q1 – Questionnaire to customers and competitors.

⁵³ Replies to question 6.7 of Q1 – Questionnaire to customers and competitors; question 4.7 – Questionnaire to trade associations.

4.1.2. *The management of transport infrastructure*

4.1.2.1. Product market definition

Atlantia's views

- (81) Atlantia submits that the relevant market should be defined to include the management of all transport infrastructure which can be considered substitutable from the user perspective on a particular route, i.e. roads other than toll motorways, railways as well as, in limited cases, airplanes.⁵⁴

Commission's assessment

- (82) In its prior decision practice, the Commission has considered a market for the transport on toll motorways, also corresponding to the management of motorway concessions, and consisting in the provision of speedy and secure road transport infrastructure between various geographical points (routes).⁵⁵
- (83) The Commission has left open the question of whether alternative means of transport are in the same market as toll motorways, indicating that the existence and extent of inter-modal competition have to be assessed on a route-by-route basis.⁵⁶
- (84) Most respondents to the market investigation having expressed an opinion indicate that users of a toll motorway on a specific route (from a point of origin to a point of destination) consider the other transport modes available on that route (i.e. transport by car or bus on roads other than toll motorways, transport by rail, in limited cases transport by air) as substitutable with the use of the toll motorway.⁵⁷
- (85) Nevertheless, they acknowledge that the substitutability and competitiveness of the alternative modes of transport depend on a number of factors, such as the distance, travel duration and time, costs, type (business or leisure) and reasons of the trip, and convenience.⁵⁸

⁵⁴ Form CO, paragraph 131.

⁵⁵ Cases M.4249 – *Abertis/Autostrade*, paragraph 18; M.4087 – *Eiffage/Macquarie/APRR*, paragraph 18.

⁵⁶ Cases M.5855 – *DB/Arriva*, paragraph 67; M.4087 – *Eiffage/Macquarie/APRR*, paragraph 19; M.3770 – *Lufthansa/Swiss*, paragraph 14.

⁵⁷ Replies to question 9 of Q1 – Questionnaire to customers and competitors; question 6 of Q2 – Questionnaire to granting authorities; question 7 – Questionnaire to trade associations.

⁵⁸ Replies to question 9 of Q1 – Questionnaire to customers and competitors.

4.1.2.2. Geographic market definition

Atlantia's views

- (86) Atlantia agrees on the point-to-point definition applied by the Commission in its prior decision practice.⁵⁹

Commission's assessment

- (87) In its prior decision practice, the Commission has defined transport on toll motorways according to the Origin & Destination ("O&D") method, whereby every combination of a point of origin and a point of destination is considered a distinct market from the demand side.⁶⁰
- (88) The market investigation has not raised elements that would justify deviating from the Commission's prior decision practice.

4.1.2.3. Conclusion on market definition

- (89) For the purpose of this Decision, the question of whether the provision of transport services on toll motorways is to be distinguished from the other transport modes may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.
- (90) Considering that the Parties do not offer transport infrastructure services other than on toll motorways or toll roads,⁶¹ the Commission will assess the effects on the Transaction on the narrower product market, i.e. the provision of transport infrastructure services on toll motorways.
- (91) As to the geographic market definition, for the purpose of this Decision, every combination of a point of origin and a point of destination will be considered as constituting a distinct market.

4.2. Food services concessions

- (92) In its prior decision practice relating to concession food services, the Commission has mainly analysed the competitive dynamics at the time of the award of food services concessions (competition *for* the market).
- (93) Considering that Atlantia (through Autogrill) and Abertis (through Areamed) may be subject to the competitive constraint exerted by other providers of conceded services (food services or retail), the Commission has assessed whether, in relation to concession food services, competition *in* the market should also be analysed. For that purpose, and by analogy with the approach taken for toll motorway concessions (see section 4.1.2 above), the Commission has considered the definition of two distinct markets: (i) the grant (or award) of food services

⁵⁹ Form CO, paragraph 133.

⁶⁰ Cases M.7512 – *Ardian/Abertis/Tunels*, paragraph 25; M.4249 – *Abertis/Autostrade*, paragraphs 20-21.

⁶¹ Form CO, paragraphs 2 and 4. Only Abertis is active on toll roads.

sub-concessions on motorway service areas, and (ii) the provision of food services on motorway service areas.

4.2.1. The grant of food services sub-concessions on motorway service areas

4.2.1.1. Regulatory framework

- (94) This section describes the rules applicable to the grant of food services sub-concessions by toll motorway concessionaires, as determined by EU law or the laws of EEA countries in which Abertis holds toll motorway concessions.⁶²

At EU level

- (95) The Concessions Directive does not provide for a specific legal regime applicable to the granting of sub-concessions by concessionaires.

In Italy

- (96) The procedures for the award of all services provided in motorways service areas by motorway concessionaires are subject to the specific regime set forth in Law No. 498/92 (as amended),⁶³ which notably requires that ANAS⁶⁴ approves the schemes of the invitation to tender.⁶⁵
- (97) Furthermore, ASPI convention [*details over the convention between ASPI and ANAS*].⁶⁶
- (98) Finally, in 2000, the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*, "AGCM") scrutinised the acquisition of control of ASPI by Edizione.⁶⁷ In that framework, it imposed certain commitments concerning the award of food service concessions on ASPI's motorway network, in order to neutralise a possible strengthening of Autogrill's dominant position on the Italian market for the supply of food services on motorways. The decision notably requires that (i) ASPI fully tenders out the supply of food services on its network, (ii) the tendering procedure is entrusted to an independent body, and (iii)

⁶² As further described in section 5.2.3, and provided that Edizione controls Atlantia, the vertical relationships between the activities of Atlantia as a toll motorway concessionaire (hence a grantor of food services sub-concessions) and of Autogrill as a grantee of food services sub-concessions pre-date the Transaction. In addition, it clearly appears from the Commission file that [*details concerning the JV future business intentions*]. Therefore, the Transaction has no specific effect in countries where Atlantia only (and not Abertis) is active as a toll motorway concessionaire (hence a grantor of food-services sub-concessions). This is the case of Poland. There is thus no need, for the purpose of this Decision, to describe the regulatory framework applicable to the grant of food services sub-concessions in Poland.

⁶³ Law No 498 of 23 December 1992 on urgent intervention on public finance (*Legge 23 dicembre 1992, n. 498 - Interventi urgenti in materia di finanza pubblica*), particular its Article 11.

⁶⁴ ANAS S.p.A. (*Azienda Nazionale Autonoma delle Strade*) is the public body responsible for managing the national road network in Italy.

⁶⁵ Paragraph 5(d) of Law No. 498/92.

⁶⁶ Form CO, paragraph 397.

⁶⁷ Decision No 8090 of 2 March 2000 in Case C3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*.

the share of outlets entrusted to Autogrill by Atlantia does not exceed 72%. Those commitments, which have no time limit, still apply to Atlantia⁶⁸ and would still apply post-Transaction, unless they are revised following a change in the factual or legal situation on which the AGCM decision was based.⁶⁹

In Spain

- (99) According to Law 37/2015 on roads (the "Road Act"),⁷⁰ sub-concessions for motorway service areas shall be awarded to the most economically advantageous tender following a tender procedure, which shall be approved by the Ministry of Public Works and Transport.

In France

- (100) Law No 2015-990⁷¹ for the economic growth, activity and equal economic opportunities regulates the procedure for the grant of sub-contracts for the building, operation and maintenance of the ancillary facilities of motorway concessions. In particular, it provides for an appropriate publicity to ensure a competitive process and requires that the grantee is approved by the administrative authority, upon opinion of the French rail and road regulatory body (*Autorité de régulation des activités ferroviaires et routières*, "ARAFER").

4.2.1.2. Product market definition

Atlantia's views

- (101) Atlantia considers that the relevant product market should be defined as the market for concession food services, covering the award of food services concessions and the provision of concession food services.⁷²

Commission's assessment

- (102) In its prior decision practice, when assessing competition at the time of the award of food services concessions (competition *for* the market), the Commission has identified a market for concession food services distinct from contract food services, consisting in the outsourcing or the provision of food service requirements to the public in travel- and retail-related locations and leisure venues.⁷³

⁶⁸ Reply of Atlantia to QP3 of 28 July 2017, paragraph 17.

⁶⁹ Email from the AGCM of 06 October 2017.

⁷⁰ Law 37/2015, of 29 September, on roads (*Ley 37/2015, de 29 de septiembre, de carreteras*), in particular its Article 27.

⁷¹ Law n°2015-990 of 6 August 2015 for growth, activity and equality of economic opportunities (*Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques*), in particular its Article 13.

⁷² Form CO, paragraphs 115 and 146.

⁷³ Cases M.4762 – *Autogrill/Alpha Airports Group*, footnote 4; M.4249 – *Abertis/Autostrade*, paragraph 28; M.2977 – *Compass/Onama Spa*, paragraphs 12 and 18.

- (103) The Commission has further considered whether the market for food services concessions should be divided according to the type of activity primarily carried out in the areas where concession food services are provided (e.g. travel, retail, sports or leisure). Within food services concessions in travel-related locations, the Commission has considered a further sub-division according to the type of locations or venues (e.g. airports, railway stations, motorway service areas).⁷⁴
- (104) Conversely, the Commission has considered whether concession food services provided on motorway service areas are part of a broader market for services ancillary to the operation of toll motorway facilities, also including gas sales or hotel accommodation.⁷⁵
- (105) A majority of respondents to the market investigation having expressed an opinion confirms that the grant of sub-concessions for commercial ancillary facilities located on motorway service areas (such as food services / restaurants, gas stations, retail stores, hotels or parking areas) could be defined as an economic activity where supply is represented by the motorway concessionaire (managing the toll motorway concession) and demand by undertakings or consortia of undertakings with an interest in acquiring the sub-concessions for commercial ancillary facilities on the motorway services areas.⁷⁶
- (106) The results of the market investigation are not sufficiently clear to conclude on the segmentation of the market for the grant of sub-concessions by type of services offered (e.g. food services, gas stations). Indeed, the views of respondents having expressed an opinion are split as to (i) whether motorway concessionaires grant different sub-concessions for the different services to be offered on motorway service areas;⁷⁷ and (ii) whether companies competing for the grant of sub-concessions for one type of services (e.g. food services) differ from the companies competing for the grant of sub-concessions for another type of services (e.g. gas stations).⁷⁸
- (107) Likewise, the market investigation does not lead to a clear-cut outcome as to (i) the possible distinction between the grant of food services between travel-related and non-travel related locations; or (ii) the possible further distinction, within travel-related locations, between motorway services areas and other locations or venues.
- (108) On point (i), the views of market respondents having expressed an opinion differ as to whether companies competing for the grant of sub-concessions (i.e. for the management of restaurants) located on travel-related locations are different from those competing for sub-concessions (i.e. for the management of restaurants)

⁷⁴ Cases M.4762 – *Autogrill/Alpha Airports Group*, paragraph 12; M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 10.

⁷⁵ Case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 22.

⁷⁶ Replies to question 7 of Q1 – Questionnaire to customers and competitors; question 4 of Q2 – Questionnaire to granting authorities; question 5 of Q3 – Questionnaire to trade associations.

⁷⁷ Replies to question 7.2 of Q1 – Questionnaire to customers and competitors; question 4.2 of Q2 – Questionnaire to granting authorities; question 5.2 of Q3 – Questionnaire to trade associations.

⁷⁸ Replies to question 7.3 of Q1 – Questionnaire to customers and competitors; question 4.3 of Q2 – Questionnaire to granting authorities; question 5.3 of Q3 – Questionnaire to trade associations.

located on non-travel related locations (e.g. leisure, sports or retail venues such as museums, cinemas, stadiums, shopping centres).⁷⁹

- (109) On point (ii), there are indications that companies competing for the grant of sub-concessions (i.e. for the management of restaurants) located on motorway service areas are the same as the companies competing for the grant of sub-concessions (i.e. for the management of restaurants) located on other travel-related locations (e.g. other roadsides, airports, railway stations, ferries). In particular, large food services providers, like Autogrill, are active at different travel-related locations, such as motorways, airports and train stations. Nevertheless, as the views of respondents to the market investigation diverge,⁸⁰ no definitive conclusion can be reached on that matter.

4.2.1.3. Geographic market definition

Atlantia's views

- (110) Atlantia considers that the market for concession foodservices may be considered at least national in scope, but it is likely to be wider.⁸¹

Commission's assessment

- (111) In its prior decision practice regarding food services concessions, the Commission has initially considered that the market for concession food services is national in scope,⁸² before considering it as possibly wider than national.⁸³ With regard to a neighbouring market, i.e. the market for the award of concessions for travel retail services at airports, the Commission has found some indications that the market could be at least EEA-wide in scope.⁸⁴
- (112) As for toll motorway concessions, it is not possible, at this stage, to conclude firmly on the precise geographic scope of the market for the grant of food services sub-concessions.
- (113) Indeed, the shares of food services concessions managed by Autogrill vary significantly from an EEA Member State to another. Autogrill remains notably strong in Italy, where it achieves a market share of [50-60]% in revenues.
- (114) However, the progressive implementation in the national laws of EEA countries of requirements for motorway concessionaires to grant sub-concessions following a transparent competitive procedure as well as the internationalisation of food

⁷⁹ Replies to question 7.5 of Q1 – Questionnaire to customers and competitors; question 4.5 of Q2 – Questionnaire to granting authorities; question 5.5 of Q3 – Questionnaire to trade associations.

⁸⁰ Replies to question 7.4 of Q1 – Questionnaire to customers and competitors; question 4.4 of Q2 – Questionnaire to granting authorities; question 5.4 of Q3 – Questionnaire to trade associations.

⁸¹ Form CO, paragraph 148.

⁸² Case M.2977 – *Compass/Onama Spa*, paragraph 17; M.126 – *Accor/Wagons-Lits*, point Y.3.

⁸³ Cases M.4762 – *Autogrill/Alpha Airports Group*, paragraph 15; M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 13.

⁸⁴ Cases M.7622 – *Dufry/ World Duty Free*, paragraph 24; M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 52.

services concessionaires point towards the definition of an EEA-wide or worldwide geographic market.

- (115) Finally, the results of the market investigation are inconclusive. In particular, respondents express different opinions as to the level of homogeneity of rules applicable to the grant of sub-concessions across EEA countries.⁸⁵

4.2.1.4. Conclusion on market definition

- (116) For the purpose of this Decision, the question of whether there is an overall market for the grant of sub-concessions for commercial ancillary facilities on motorway services areas or whether it should be segmented by type of services or locations may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (117) Considering that Autogrill is only active in the provision of food services, the Commission will assess the effects of the Transaction on the narrower product market, i.e. the grant of food services sub-concessions on motorway service areas. By analogy with the definition of the market for the grant of toll motorway concessions and in line with the outcome of the market investigation, this market will be defined as an economic activity where supply is represented by the motorway concessionaires (managing the toll motorway concessions) and demand by undertakings or consortia of undertakings with an interest in acquiring the sub-concessions for food services on the motorway services areas.
- (118) In addition, the question of whether the market for the grant of food services sub-concessions on motorway service areas is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.2.2. *The provision of concession food services on motorway service areas*

4.2.2.1. Product market definition

Atlantia's views

- (119) Atlantia considers that the relevant product market should be defined as the market for concession food services, covering the award of food services concessions and the provision of concession food services.⁸⁶ Furthermore, according to Atlantia, there is a high degree of substitutability between the food services offered by the traditional concession food service providers and the food services offered by other motorway sub-concessionaires, such as operators of gas stations.⁸⁷

⁸⁵ Replies to question 8 of Q1 – Questionnaire to customers and competitors; question 5 of Q2 – Questionnaire to granting authorities; question 6 of Q3 – Questionnaire to trade associations.

⁸⁶ Form CO, paragraphs 115 and 146.

⁸⁷ Form CO, paragraph 383.

Commission's assessment

- (120) The Commission has not, in its past decision practice, defined a market for the provision of concession food services on motorway service areas, distinct from the market for the grant of food services sub-concessions on motorway service areas.
- (121) However, it has identified two neighbouring markets: (i) the provision of retail services at airports, distinct from the market for the award of concession for the operation of retail services at airports;⁸⁸ and (ii) the retail supply of motor fuels (i.e. sales of motor fuels at service stations), possibly divided between sales at motorway and at non-motorway stations.⁸⁹
- (122) In addition, the Commission has found that there is a market for motorway catering distinct from the market of traditional catering, based on demand-side considerations (captive customers only made of motorway users) and supply-side considerations (wide turnover variations, importance of ancillary services, long opening hours and heavily regulated environment). Within that market, it has distinguished between (i) food services strictly speaking (restaurants), (ii) refreshment services, and (iii) sale of food products.⁹⁰
- (123) In that context, in the present case, the Commission has assessed (i) whether the market for the provision of food services should be divided between food services provided on motorway service areas and at other locations, and (ii) concession food services provided on motorway services areas represent a part of a wider market also encompassing refreshments services and sale of food products on motorway services areas.
- (124) On the distinction between motorway service areas and other locations, the market investigation is inconclusive. Respondents to the market investigation having expressed an opinion are almost equally distributed between those believing that car or truck drivers consider the provision of food services on motorway service areas as substitutable with the provision of food services at other locations (i.e. outside motorway service areas), those believing the opposite, and those believing that it depends.⁹¹
- (125) On the distinction between food services (restaurants) and other products provided on motorway service areas, respondents to the market investigation having expressed an opinion are also split between those believing that users of a motorway service area consider the provision of food in gas stations or retail stores located on that service area as substitutable with the provision of food

⁸⁸ Cases M.6723 – *Ferrovial/Qatar Holding/CDPQ/Baker Street/BAA*, paragraph 27; M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 18; M.5123 – *Autogrill/World Duty Free*, paragraphs 8 and 16.

⁸⁹ Cases M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 28; M.5637 – *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 29.

⁹⁰ Case M.126 – *Accor/Wagons-Lits*, points Y.1-2.

⁹¹ Replies to question 26 of Q1 – Questionnaire to customers and competitors; question 23 of Q2 – Questionnaire to granting authorities; question 24 of Q3 – Questionnaire to trade associations.

services by restaurants located on that service area, those believing the opposite, and those believing that it depends.⁹²

4.2.2.2. Geographic market definition

Atlantia's views

- (126) Atlantia does not take a firm view as to the geographic scope of the market for the provision of concession food services.

Commission's assessment

- (127) The Commission has not, in its past decision practice, defined the geographic scope of the market for the provision of concession food services. For reasons of demand side considerations, since motorists choose only among motorway services areas convenient for their journey, the provision of concession food services appears to have local features. This is in line with the Commission's past decision practice regarding the retail supply of motor fuels⁹³ or restaurants,⁹⁴ as well as with the AGCM decision referred to in section 4.2.1.1.⁹⁵
- (128) However, due to the homogeneity in prices and in consumer preferences as well as a possible chain of substitution effect across motorway service areas, it cannot be excluded that the market for the provision of concession food services is national. In addition, supply-side considerations, notably the number of players operating on an at least national basis, would plead in favour of the relevant geographic market being defined as wider than local.

4.2.2.3. Conclusion on market definition

- (129) For the purpose of this Decision, the question of whether the market for the provision of concession food services on motorway service areas is part of a wider product market (encompassing other locations or other services) may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (130) Considering that Abertis, as a concessionaire, only manages toll roads and that Autogrill is only active in the provision of food services, the Commission will assess the effects of the Transaction on the narrower product market, i.e. the provision of concession food services on motorway service areas.
- (131) In addition, for the purpose of this Decision, the question of whether the market for the provision of concession food services on motorway service areas is local

⁹² Replies to question 25 of Q1 – Questionnaire to customers and competitors; question 22 of Q2 – Questionnaire to granting authorities; question 23 of Q3 – Questionnaire to trade associations.

⁹³ Cases M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 62; M.5637 – *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 37.

⁹⁴ Cases M.6895 – *3G Special Situations Fund III/ Berkshire Hathaway/ H J Heinz Company*, paragraph 24; M.4220 – *Food Service Project/Tele Pizza*, paragraph 15.

⁹⁵ Decision No 8090 of 2 March 2000 in Case C3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*. In particular, in paragraph 38, the AGCM considers that each outlet is substitutable with the other outlets located within 100 km on the same traffic line.

or national may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.3. The provision of ETS / distribution of on-board equipment

4.3.1. Regulatory framework

- (132) On 31 May 2017, the Commission issued its Proposal (to recast Directive 2004/52/EC) for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union.
- (133) When describing the reasons for and objectives of the proposal, the Commission emphasised that (i) even if the electronic toll collection systems have been deployed at national, regional or local level in 20 Member States and the number of systems is increasing constantly, the vast majority require road users to install special equipment, namely on-board units / on-board equipment ("OBU" / "OBE") in their vehicles. While few offer cross-border interoperability, most do not. This results in costs and burdens for users, who must equip their vehicles with multiple OBUs to be able to drive unhindered in different countries; and (ii) the objective of the EU legislation at stake – and in particular the pan-European interoperability of electronic road toll systems that was the main objective of the directive – remain largely unattained.

4.3.2. Product market definition

4.3.2.1. Atlantia's view

- (134) Atlantia considers that the relevant product market should be defined as the market for the provision of ETS / distribution of OBE.⁹⁶

4.3.2.2. Commission's assessment

- (135) With regard to the distribution of OBE, in the ETS industry the following five main categories of stakeholders can be identified: concessionaires, OBE manufacturers / Intelligent Transport Systems ("ITS") providers, distributors or electronic tolling service provider ("ETSP"), financial institutions, and OBE users (the drivers).⁹⁷
- (136) In a prior decision,⁹⁸ the Commission has concluded that the different methods of toll payment, i.e. in cash, by credit/debit card, or by using a device installed in the vehicle, namely the OBE, do not form part of the same product market. The Commission has therefore defined a market for the distribution of OBE devices. In addition, in its evaluation of European Electronic Toll Service ("EETS")

⁹⁶ Form CO, page 39.

⁹⁷ Case M.7075 – *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 33.

⁹⁸ Case M.7075 – *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 36.

Directive and EETS Decision, the Commission has also not excluded different usage paths for car drivers and heavy traffic (trucks).⁹⁹

- (137) The results of the market investigation in the present case are inconclusive with regard to the question of whether the market for the distribution of OBE devices should be considered as a distinct market. While some respondents, in line with the previous Commission's findings, confirm that OBE devices are not substitutable to other means of toll payment (such as credit/debit card and cash), others indicate that car drivers as well as truck (heavy vehicles) drivers using a toll motorway consider the different means of toll payment as interchangeable and that once someone has started using an OBE device they would be willing to switch to other means of toll payment if the current costs of OBE devices were to increase by 5-10% on a permanent basis.¹⁰⁰
- (138) Finally, the majority of the respondents to the market investigation having expressed an opinion indicates that there are no significant differences between the provision of ETS / distribution of OBE to car drivers and the provision of ETS / distribution of OBE to truck drivers, notably in terms of cost and type of devices.¹⁰¹ However, some respondents also point out to a distinction between the two segments notably due to technical interoperability issues.¹⁰²

4.3.3. Geographic market definition

4.3.3.1. Atlantia's view

- (139) Atlantia considers the market for the provision of ETS / distribution of OBE as national in scope.¹⁰³

4.3.3.2. Commission's assessment

- (140) In a prior decision, the Commission has considered the market for the distribution of OBE devices as likely national in scope. Notably when analysing the progress achieved in the EETS implementation, the Commission reached the conclusion that there are still different national systems due to technical barriers which have not been removed by the Member States and the stakeholders. Therefore, a pan-European interoperability of electronic road toll systems has not been achieved yet.¹⁰⁴
- (141) The results of the market investigation in the present case are inconclusive with regard to the geographic scope of the market for the distribution of OBE devices. While some of the respondents to the market investigation provide indications towards an EEA dimension others confirmed that the implementation of the

⁹⁹ See Evaluation and fitness check roadmap on the European Electronic Toll Service – Directive 2004/52/EC and Decision 2009/750/EC.

¹⁰⁰ Replies to questions 10-11 of Q1 – Questionnaire to customers and competitors.

¹⁰¹ Replies to questions 10-11 of Q1 – Questionnaire to customers and competitors.

¹⁰² Replies to questions 12-13 of Q1 – Questionnaire to customers and competitors.

¹⁰³ Form CO, page 51-52.

¹⁰⁴ Case M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 38.

EETS took place only in some of the EEA countries but not in all. For example it is still ongoing in Italy and Germany.¹⁰⁵

4.3.4. Conclusion on market definition

(142) For the purpose of this Decision, the questions of whether (i) the market for the provision of ETS / distribution of OBE devices constitutes a distinct market, (ii) OBE devices are substitutable to other means of toll payment, and (iii) distribution of OBE to cars should be distinguished from the distribution of OBE to trucks, may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.

(143) As regards the geographic scope, the question on whether the market for the distribution of OBE devices is national or EEA-wide in scope may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.4. The provision of equipment or services for intelligent transport systems

4.4.1. Regulatory framework

(144) While in Spain there is no specific provision with regard to Abertis' concessions, in Italy and France a regulatory framework is applicable.¹⁰⁶

In Italy

(145) In Italy, Article 177 of the Code introduced the obligation for the concessionaire to award 80% of the contracts for provision of services exceeding a given threshold (EUR 150 000) through a public tender procedure. Consequently, within the abovementioned 80% share, intra-group companies interested in the contracts to be awarded have to take part to such public tenders, direct awarding being precluded.

In France

(146) In France, further to Law 2015-990, motorway concessionaires must implement procurement procedures for the award of their works, supplies or services subcontracts (i) above a certain threshold and (ii) to be executed after the date of full commissioning of the structures or works contemplated in the original concession contract. The applicable regulatory framework does not exclude the possibility for in-house providers to participate to the tender procedure launched by the motorway concessionaire like any other player.

¹⁰⁵ Replies to questions 13-14 of Q1 – Questionnaire to customers and competitors.

¹⁰⁶ Form CO, pages 138 and 139.

4.4.2. Product market definition

4.4.2.1. Atlantia's views

(147) Atlantia has identified a market for the provision of equipment or services for ITS, which consists in the manufacture of OBE, and the initial set-up and maintenance of certain roadside equipment, such as tag readers/antennas, in proximity of the free flow lane, that communicate with on-board equipment, as well as cameras for automated license plate recognition, or other equipment aimed at automatising toll fee collection and calculation. In order to satisfy their needs, motorway concessionaires typically select ITS providers through bidding procedures.

4.4.2.2. Commission's assessment

(148) The Commission has not previously assessed a market for the provision of equipment or services for ITS.

(149) In the present case, while the majority of the respondents to the market investigation having expressed an opinion agree with the definition proposed by Atlantia, they also acknowledge a distinction between the provision of electronic toll collection equipment (including the manufacture and provision of OBE) and the provision of other ITS equipment.¹⁰⁷

4.4.3. Geographic market definition

4.4.3.1. Atlantia's views

(150) According to Atlantia, the geographic dimension of the market for ITS equipment/services is (at least) EEA-wide, notably as (i) there are no technical, regulatory, or other barriers that would create separate national systems in the EEA and (ii) several European players usually take part in bidding procedures launched by motorway concessionaires for the provision of ITS equipment/services.

4.4.3.2. Commission's assessment

(151) The results of the market investigation are inconclusive with regard to the geographic scope of the market for ITS equipment or services. While some of the respondents to the market investigation indicate that the conditions of competition (e.g. equipment or services requested by motorways concessionaires, price levels, procedures for the award of the contract by motorways concessionaires) for providing equipment or services for ITS are homogeneous in the EEA, others also provide indications towards significant differences from one EEA country to another.¹⁰⁸

¹⁰⁷ Replies to question 16 of Q1 – Questionnaire to customers and competitors.

¹⁰⁸ Replies to question 17 of Q1 – Questionnaire to customers and competitors

4.4.4. Conclusion on market definition

- (152) For the purpose of this Decision, the question of whether a distinction should be made between the provision of electronic toll collection equipment (including the manufacture and provision of OBE) and the provision of other ITS equipment may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (153) As to the geographic market definition, the question of whether the market for the provision of equipment or services for ITS is national or EEA-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

4.5. The construction of infrastructure

4.5.1. Regulatory framework

- (154) Within the market for the construction of infrastructure, the demand is represented by the State, other contracting authorities, as well as private concessionaires.
- (155) Regarding road construction, the contracts are awarded under a specific regime determined by European and national law.

At EU level

- (156) The award of works contracts related to road concessions is covered by the Concessions Directive as well as Directives 2014/24/EU and 2014/25/EU (the "Public Procurement Directives").¹⁰⁹

In Italy

- (157) In Italy, the regulatory regime related to road construction works on motorways is provided by the legislative Decree No. 50 of 18 April 2016 (*Decreto Legislativo N° 50/2016*), implementing the Concessions and Public Procurement Directives. Article 177 of this legislative Decree provides that concessionaires (State-owned and private ones) are obliged to outsource at least 80% of their contracts concerning works, services, and supply. Pursuant to the same provision, when granting such contracts, the concessionaires have to use tendering procedures.

In Spain

- (158) In Spain, the legal framework applicable to works related to motorway concessions is contemplated in (i) the Public Sector Contracts Act, i.e. the Royal Legislative Decree 3/2011 of 14 November, (ii) the Spanish Act 8/1972 of 10 May 10 on construction, maintenance and operation of motorways, as well as (iii) Decree 215/1973 of 25 January, on the general terms governing the construction,

¹⁰⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 094 28.3.2014, p. 65, and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 094 28.3.2014, p. 243.

maintenance and operation of motorways under concession. The Spanish Act 8/1972 distinguishes between two types of administrative motorway concessions: on the one hand, construction, maintenance and operation of motorways; on the other hand, maintenance and operation of already constructed motorway sections.

- (159) According to Article 240 of the Public Sector Contracts Act, the execution of the works that a concessionaire is entitled to perform pursuant to the grant of the concession may be sub-contracted to third parties or to their in-house companies but only through a tender procedure.¹¹⁰ As a result, even the assignment of works to in-house companies is subject to a tender procedure.

In France

- (160) In France, the relevant provisions are contained in Law No 2015-990. Article 13 of this Law requires motorway concessionaires to award their subcontracts for works, supplies or services above a certain threshold through a procurement procedure similar to the procedure applicable to public procurement contracts. Regarding works contracts, this threshold is EUR 500 000.

4.5.2. Product market definition

4.5.2.1. Atlantia's views

- (161) Atlantia submits that the market for construction of all large infrastructure should be considered as the relevant market for the purpose of the Transaction.¹¹¹ In addition, according to Atlantia, there is no need to distinguish a separate market for engineering services.¹¹²

4.5.2.2. Commission's assessment

- (162) In its prior decision practice, the Commission has considered the possibility to distinguish within the market for construction services between (i) large and small infrastructure (divided according to the projects concerned), (ii) roads and other types of infrastructure, and (iii) motorways and other roads.¹¹³
- (163) In a prior decision regarding transport, the Commission has also considered engineering services as a distinct market.¹¹⁴
- (164) Respondents to the market investigation having expressed an opinion did not provide any indications that would justify deviating from the Commission's precedents. However, with regard to the question of whether the activity of infrastructure construction includes, by nature, the activity of engineering services, the results of the market investigation are inconclusive. While some respondents indicate that the two types of activities are different and undertaken by different companies, others indicate that engineering activities can also be part

¹¹⁰ Form CO, paragraph 356.

¹¹¹ Form CO, paragraph 138.

¹¹² Form CO, footnote 59.

¹¹³ Case M.4087 – *Eiffage/Macquarie/APRR* and Case COMP/4249 *Abertis/Autostrade*.

¹¹⁴ Case M.6646 – *Alstom Transport SA /FSI/ Translohr*.

of the activity of infrastructure construction. The results would be the same when considering the construction of motorways only.¹¹⁵

4.5.3. Geographic market definition

4.5.3.1. Atlantia's views

(165) Atlantia submits that the geographic market definition for the construction of infrastructure is at least EEA-wide.¹¹⁶

4.5.3.2. Commission's assessment

(166) In its prior decision practice, the Commission, while leaving the geographic market definition open, has defined the market for construction services as national in scope.¹¹⁷

(167) The results of the market investigation in the present case are inconclusive. While some of the respondents to the market investigation indicate that the competition conditions for the construction of infrastructure are homogeneous in the EEA and that it is common for a non-domestic company to be in charge of infrastructure construction, others also provide indications towards differences among EEA countries, notably with respect to the regulatory framework applied at national level, the awarding criteria and the scope of the contracts.¹¹⁸

4.5.4. Conclusion on market definition

(168) For the purpose of this Decision, the question of whether a distinction should be made between (i) large and small infrastructure, (ii) roads and other infrastructure, and (iii) motorways and other roads may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

(169) Considering that Abertis is only active in motorway infrastructure construction, the Commission will assess the effects on the Transaction on this narrower product market.

(170) In addition, the question of whether a distinction should be made between the market for construction of infrastructure and the market for engineering services may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible product market.

(171) As to the geographic market definition, the question of whether the market for construction of infrastructure is national or EEA-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

¹¹⁵ Replies to question 19 of Q1 – Questionnaire to customers and competitors.

¹¹⁶ Form CO, paragraph 140.

¹¹⁷ Case M.1157 *Skanska/Scancem*, and Case COMP/M.4087 *Eiffage/Macquarie/APRR*.

¹¹⁸ Replies to question 22 and 23 of Q1 – Questionnaire to customers and competitors.

5. COMPETITIVE ASSESSMENT

5.1. Horizontal effects

- (172) In this section, the Commission will assess whether the Transaction is likely to give rise to anti-competitive unilateral effects in the markets where the two Parties are actual or potential competitors.
- (173) The Transaction leads to horizontal overlaps in the following markets: (i) the grant of toll motorway concessions (Atlantia and Abertis are both active on the demand side), (ii) the transport on toll motorways, (iii) the provision of concession food services on motorway service areas, (iv) the provision of ETS / distribution of OBE, and (v) the provision of ITS equipment or services.
- (174) In addition, Atlantia and Abertis are both active on the supply side of the market for the grant of toll motorway sub-concessions, in particular for food services. Considering that Atlantia is also active on the demand side of that market through Autogrill,¹¹⁹ the impact of the Transaction on food services concessions will be dealt with as part of the assessment of the vertical effects of the Transaction.

5.1.1. *The grant of toll motorway concessions*

5.1.1.1. Analytical framework

- (175) In its prior decision practice regarding infrastructure managed under concession or franchise contracts, the Commission has assessed the impact of a concentration on the market for the grant of concessions or franchises based on three elements.
- (176) First, the Commission has taken account of the parties' combined share of the concessions or franchises operated by the parties, calculated notably on the basis of the number of concessions or franchises, of revenues or of km. Nevertheless, in bidding markets such as the grant of toll motorway concessions,¹²⁰ the Commission has acknowledged that those shares reflect the parties' position based on past grants, but not necessarily the actual or future bidding behaviour.¹²¹
- (177) Second, the Commission has analysed historic bidding data, to determine whether the parties are active bidders and compete head-to-head, as well as whether bidders are expected to enjoy significant incumbency or scale advantages as a result of previous grants of concessions or franchises.¹²²
- (178) Third, the Commission has considered the number of alternative bidders in the market and the competitive constraint they exert on the parties.¹²³

¹¹⁹ As indicated in section 1.2.2.1, Areamed [*details concerning the JV future business intentions.*]

¹²⁰ As recalled in section 4.1.1.1, the Concessions Directive requires that toll motorway concessions be granted following open competitive procedures.

¹²¹ Case M.5855 – *DB/Arriva*, paragraph 32.

¹²² Case M.5855 – *DB/Arriva*, paragraphs 33-35.

¹²³ Case M.5855 – *DB/Arriva*, paragraph 37.

5.1.1.2. Atlantia's views

(179) Atlantia considers that the Transaction will not give rise to unilateral effects concerns in the market for the grant of motorway concessions in the EEA or in Italy, since (i) the grant of toll motorway concessions is a bidding market regulated by EU and national law; (ii) the Parties have participated in very few tenders and never bid against each other in the last years; and (iii) a number of strong and successful competitors have participated in these tenders.¹²⁴

5.1.1.3. Commission's assessment

Combined shares of toll motorway concessions operated by the Parties

(180) According to Atlantia, the Parties manage less than [5-10]% of the worldwide toll motorways based on km and revenues (Atlantia: [0-5]% in km and [0-5]% in revenues; Abertis: [0-5]% in km and revenues), so that no affected market would exist at worldwide level.

(181) According to Atlantia, the Parties manage [10-20]% of EEA toll motorways based on km (Atlantia: [5-10]%; Abertis: [5-10]%) and [20-30]% based on revenues (Atlantia: [10-20]%; Abertis: [10-20]%).¹²⁵ Post-Transaction, the merged entity would become the market leader in the EEA, ahead of Vinci ([5-10]% in km and [10-20]% in revenues), Eiffage ([0-5]% in km and [5-10]% in revenues), Gavio Group ([0-5]% in km and [0-5]% in revenues), Brisa ([0-5]% in km and revenues), Itinere ([0-5]% in km and revenues) and Ferrovial ([0-5]% in km and revenues). The remaining motorways ([60-70]% in km and [40-50]% in revenues) are managed by 139 concessionaires operating, on average, 224 km of motorways.¹²⁶

(182) At national level, the Parties are both present in one EEA country only (Italy). In Italy, they together manage [50-60]% of the motorway network based on km (Atlantia: [50-60]%; Abertis: [0-5]%) and [70-80]% of toll revenues (Atlantia: [60-70]%; Abertis: [5-10]%). There is only one other operator with more than 5% of Italian toll motorways under its management, i.e. Gavio Group ([10-20]% in km and [10-20]% in revenues).¹²⁷ However, Abertis' increment in Italy is limited to the 234 km managed until 2026 by A4 Holding, which Abertis acquired in 2016

¹²⁴ Form CO, paragraph 325.

¹²⁵ According to the Parties, the difference between the Parties' shares based on km and revenues is essentially due to the fact that revenues are a function also of the level of the tariff (as ultimately decided by the public authority) and of the traffic flows (Form CO, paragraph 218).

¹²⁶ Form CO, tables on pages 70-71. The market shares are calculated on the basis of the direct tolling system only, i.e. the system by which the concessionaire collects tolls from users (distance-based charge) to cover its capital and operating expenditure. According to Atlantia, no data are available for the other tolling systems, i.e. (i) the indirect tolling system, by which users pay a toll to the public authority, usually on the basis of a "vignette" (time-based charge) and the concessionaire is remunerated by the public authority, and (ii) the shadow tolling system, by which the concessionaire does not collect tolls from users (use of the motorway is free) and is remunerated by the public authority. Since, in the EEA, Atlantia and Abertis manage motorways solely on the basis of the direct tolling mechanism, the proposed method for calculating market shares results in conservative estimates.

¹²⁷ Form CO, tables on pages 72-73.

from its former shareholders Intesa, Astaldi and the Tabacchi family following a secondary transaction (acquisition of an existing concessionaire).

Historic bidding data

- (183) Atlantia has provided data on [...] tenders launched since 2007 for the grant of toll motorway concessions, including [...] tenders concerning EEA countries.¹²⁸ The analysis of bidding data shows that (i) neither of Atlantia or Abertis have been very active bidders over the last ten years; and (ii) Atlantia and Abertis have rarely participated in the same award procedure.
- (184) More specifically, [...] ¹²⁹ [...] ¹³⁰ Therefore, in the EEA, Atlantia and Abertis have not competed for the same toll motorway concessions to be awarded by public authorities over the last ten years.¹³¹
- (185) Respondents to the market investigation confirm that neither Atlantia nor Abertis have been active players in the market for the grant of toll motorway concessions and have not bid against each other, with the exception of Chile.¹³²
- (186) The Commission also finds that Atlantia and Abertis have not competed directly against each other, even if it takes account of secondary transactions (i.e. sale and acquisition of existing concessionaires) in the EEA. More specifically, out of the [...] secondary transactions completed in the past five years in Italy, Spain, France, Poland or the UK,¹³³ Atlantia and Abertis never bid against each other as potential acquirers. In fact, [...].

Parties' bidding strategies

- (187) According to Atlantia, the limited past and recent activity of the Parties on the market for the grant of toll motorway concessions at EEA and worldwide levels stems from [*details on Atlantia's future strategic decisions*]. In addition, Atlantia argues that [*details on Atlantia's future strategic decisions*] Therefore, Atlantia submits that [*details on Atlantia's future strategic decisions*]¹³⁴

¹²⁸ Form CO, Annex 8.1.1.

¹²⁹ Atlantia, through ASPI, participated [...]. In addition, one of ASPI's subsidiaries [...] (Form CO, paragraph 275 and footnote 109).

¹³⁰ [*Abertis' participation in past tenders*]. Abertis' entry in Italy was achieved through a secondary transaction, more precisely through the acquisition of a majority shareholding in A4 Holding in 2016, and not through the grant of a toll motorway concession by the competent Italian roads authority.

¹³¹ One of the respondents to the market investigation notes that [*details on Atlantia and Abertis business policy*] (reply to question 42.1 of Q1 – Questionnaire to customers and competitors). Due to the specificities of that project, it is not taken into account as part of the toll motorway concessions awarded over the last ten years.

¹³² Replies to question 2 of Q1 – Questionnaire to customers and competitors; question 24 of Q2 – Questionnaire to granting authorities; question 25 of Q3 – Questionnaire to trade associations. See also information provided by the Italian and French ministries and transports by email dated respectively 7 September 2017 and 22 September 2017.

¹³³ Form CO, Annex 8.1.2.

¹³⁴ Form CO, footnote 113.

- (188) The Commission has not found any evidence, in particular in the Parties' internal documents, running counter Atlantia's statements regarding their investment strategies and business plans.
- (189) As a consequence, the Commission considers that, absent the Transaction, (i) the Parties would have [*details on Atlantia and Abertis future business priorities*];¹³⁵ and, consequently, (ii) as in the past, Atlantia and Abertis would have competed head-to-head for the grant of toll motorway concessions only on rare occasions.
- (190) This finding would also apply to Italy, the only EEA country where both Parties currently hold toll motorway concessions. In fact, Abertis' internal documents confirm that [*details on Abertis' future strategic decisions*]. Even if it could not be excluded that Abertis, [*details on Abertis' future strategic decisions*], could bid for the renewal of the concession awarded to A4 Holding (subsequently acquired by Abertis), it should be considered that (i) it is at least uncertain whether Atlantia would have bid for that concession absent the Transaction, considering that it did not bid for the acquisition of A4 Holding and, (ii) in any case, any potential loss of competition would not materialise before 2027, when the concession awarded to A4 Holding expires.

Barriers to entry or expansion

- (191) Respondents to the market investigation identify the high investments (financial capacity), experience and know-how required to build and manage toll motorways as the main barriers to enter or expand in the sector of toll motorway concessions.¹³⁶ The Commission considers that the Transaction is unlikely to have a major impact on these barriers to entry or expansion, as confirmed by a majority of respondents to the market investigation having expressed an opinion.¹³⁷
- (192) In particular, the bidding data provided by Atlantia tend to demonstrate that, first, the submission of bids by consortia is frequent.¹³⁸ These consortia enable the combination of different skills and spread financial risks among several companies, thus mitigating the advantages in terms of integration or scale of largest concessionaires, such as Atlantia and Abertis. In addition, with regard to integration, the Transaction is unlikely to have a major effect, regardless of whether the ability to provide in-house the works and services needed for the operation of toll motorway concessions is a competitive advantage. Indeed,

¹³⁵ Abertis appears to [*details on Abertis' future strategic decisions*] (reply of Abertis to QP6 of 5 September 2017). However, Abertis' corresponding activity in the EEA would be limited and, in any case, would not overlap with Atlantia's activity, since the latter has, according to its submission, [*details on Abertis' future strategic decisions*].

¹³⁶ Replies to question 29 of Q1 – Questionnaire to customers and competitors; question 27 of Q3 – Questionnaire to trade associations.

¹³⁷ Replies to questions 29.1 and 29.2 of Q1 – Questionnaire to customers and competitors; questions 27.1 and 27.2 of Q3 – Questionnaire to trade associations.

¹³⁸ Out of the [...] tenders carried out in the EEA over the last ten years for which it has been possible for Atlantia to collect information on bidders, [...] (Form CO, paragraph 290 and Annex 8.1.1).

Atlantia is already integrated pre-Transaction and the addition of Abertis' activities does not extend the scope of Atlantia's business portfolio.¹³⁹

- (193) Second, the grant of toll motorway concessions to operators other than the incumbent concessionaire is also not unusual.¹⁴⁰ In any case, the implementation of the Concessions Directive is expected to promote the treatment on an equal footing of incumbent and non-incumbent concessionaires, considering that conceding authorities are required to apply harmonised selection criteria guaranteeing that the motorway concessions are awarded to the most economically advantageous tenders.¹⁴¹

Other bidders

- (194) There are a number of large companies competing for the grant of toll motorway concessions, such as the groups Vinci, Eiffage, Brisa, Itinere, Ferrovial or Sacyr. For instance, based on the bidding data provided by Atlantia for the last ten years, [...] Considering the significant level of integration of those large companies,¹⁴² they are expected to continue competing for the grant of toll motorway concessions, even if the merged entity were to stop participating in bidding consortia post-Transaction.
- (195) A majority of respondents to the market investigation having expressed an opinion consider that, post-Transaction, there would be a sufficient number of companies competing with the merged entity for toll motorway concessions to prevent the risk that conceding authorities receive less advantageous offers in Italy, Spain, France, Poland as well as in other EEA countries and in non-EEA countries.¹⁴³

Overall assessment

- (196) In this context, a majority of respondents to the market investigation having expressed an opinion consider that, there would be sufficient competition to

¹³⁹ According to Atlantia, Abertis' activities in the provision of satellite capacity through Hispasat has no vertical relationship with the markets for OBE distribution or ITS provision (reply of Atlantia to question 24 of QP4 of 10 August 2017).

¹⁴⁰ According to Atlantia, [*data regarding past tenders*] (Form CO, paragraph 290 and Annex 8.1.1). For the sake of clarity, modifications of an existing concession, such as the extension of its duration, which (rightly or wrongly) did not give rise to a bidding process are not taken into account for the analysis of bidding data.

¹⁴¹ For example, reply to question 29.1.1 of Q1 – Questionnaire to customers and competitors: "*The Transaction does not affect the investment capacity of the potential competitors, and does not necessarily involve an increased investment appetite of the companies of the Transaction. The barriers to enter or expand in toll way concessions are regulated by the local laws and regulations, under the frame of the EEA Directives.*"

¹⁴² Form CO, Annex 8.4.

¹⁴³ Replies to question 28 of Q1 – Questionnaire to customers and competitors; question 26 of Q3 – Questionnaire to trade associations. For example: "*We believe that after the Transaction there would be no risk for the conceding authorities to receive less advantageous offers; In fact the market is highly competitive and in any case access to the market is regulated by public tender procedures.*"

prevent the merged entity post-Transaction from raising prices or degrading service quality in the management of toll motorways post-Transaction.¹⁴⁴

(197) As far as the EEA is concerned, while some respondents point out to the strong market position of Atlantia and Abertis in, respectively, Italy and Spain, they also note that the specific impact of the Transaction on competition for the grant of toll motorway concessions is likely limited, due notably to the geographic complementarity of the Parties and the regulation of the market.¹⁴⁵

5.1.1.4. Conclusion

(198) In view of the above, and considering notably (i) the fact that Atlantia and Abertis are not very active competitors on the market for the grant of toll motorway concessions, (ii) the fact that Atlantia is not a very active competitor for the acquisition of existing concessionaires (secondary transactions) in the EEA, (iii) the number and strength of remaining competitors, and (iv) for the grant of toll motorway concessions, the degree of regulation of the award procedures, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the grant of toll motorway concessions or to secondary transactions, under any plausible geographic market definition (national, EEA-wide or worldwide).

(199) This conclusion also applies to Italy, where Atlantia and Abertis did not compete against each other in any bidding procedure for the grant of a toll motorway concession, nor for the acquisition of any concession holder. For instance, they did not compete for the acquisition of the concession holder A4 Holding, which was acquired by Abertis (and through which Abertis currently holds its only concession in the country).

5.1.2. *The transport on toll motorways*

(200) In the EEA, Atlantia manages toll motorways in Italy and Poland; Abertis manages toll motorways in Spain, France and Italy. Therefore, any possible overlap would be circumscribed to Italy.

5.1.2.1. Atlantia's views

(201) Atlantia submits that the Parties' networks do not overlap in terms of O&D. Therefore, the Transaction has no impact whatsoever on the structure and the functioning of the market for the transport on toll motorways.¹⁴⁶

¹⁴⁴ Replies to question 42 of Q1 – Questionnaire to customers and competitors; question 39 of Q2 – Questionnaire to granting authorities; question 41 of Q3 – Questionnaire to trade associations.

¹⁴⁵ Replies to questions 41-42 of Q1 – Questionnaire to customers and competitors. For example: "(...) Abertis has a dominant position in some areas in Spain and they would obviously be in better position should new projects be tendered in that area but that does not change significantly with the potential merger with Atlantia. Atlantia is concentrated in Italy (and 61km in Poland) where [...] currently does not have presence. The merger with Abertis does not alter the competitive landscape either."

¹⁴⁶ Form CO, paragraph 329.

5.1.2.2. Commission's assessment

- (202) In Italy, Abertis operates the two following concessions: A4 Brescia – Padua and A31 Piovene Rocchette-Badia Polesine. Atlantia has provided a detailed map of the Brescia and Padua regions, which demonstrates that the Parties' motorway networks do not overlap in terms of O&D. In particular, a segment of A31 (managed by Abertis) runs in parallel with a segment of A13 (managed by Atlantia), but the two connect directly different O&D pairs. The same holds true for the two other parallel segments of A4 (managed by Abertis) and A1 (managed by Atlantia).
- (203) The market investigation confirms those empirical findings. A majority of respondents to the market investigation having expressed an opinion indicate that in Northern Italy, more specifically in the Padua region, users do not consider the motorways managed by Atlantia (respectively A13 and A1) running in parallel with the motorways managed by Abertis (respectively A31 and A4) as substitutable.¹⁴⁷
- (204) In addition, the key terms and conditions of the management of toll motorways (including toll rates, remuneration of the concessionaire, quality of services) are established in the concession contracts and not left to the discretion of concessionaires after their signature.¹⁴⁸ Therefore, as confirmed by the majority of respondents to the market investigation having expressed an opinion,¹⁴⁹ the Transaction is unlikely to give rise to price increases or service quality degradation on toll motorways managed by Atlantia or Abertis in Northern Italy.

5.1.2.3. Conclusion

- (205) In view of the above, and considering notably (i) the absence of overlap between the toll motorways managed by the Parties, and (ii) the limited autonomy of the concessionaires in price setting and services under the concession contracts, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the transport on toll motorways, defined on a route-by-route basis.

5.1.3. *The provision of concession food services on motorway service areas*

- (206) Considering that Areamed (and through it Abertis) is not active in the market for the grant of food services sub-concessions on motorway service areas (i.e.

¹⁴⁷ Replies to question 33 of Q1 – Questionnaire to customers and competitors; question 31 of Q3 – Questionnaire to trade associations. For example: *"In normal conditions of traffic congestion users will prefer, depending of the point of origin and destination, one motorway to the other even if they "run parallel". The territory affected by these two motorways is very extensive and due to the distance between the two of them we can assume that they are not substitutable."*

¹⁴⁸ This does not prevent the possibility to renegotiate certain contractual provisions while the concession contracts are in force.

¹⁴⁹ Replies to question 34 of Q1 – Questionnaire to customers and competitors; question 32 of Q3 – Questionnaire to trade associations. For example: *"The regulatory framework impeding to raise prices or degrading service quality because the contract is subject to the control by state's authority. Italian motorway tolls, as such as the related service level/quality offered to users, are set in the contract stipulated with the granting authority when the concession is awarded and cannot be unilaterally modified by the Concessionaire."*

Areamed does not compete *for* the market), the Commission will solely assess the effects of the Transaction on competition in the provision of concession food services on motorway service areas.

- (207) Abertis only provides concession food services in Spain, through the management by Areamed of [...] motorway service areas and the operation of [...] food services entrusted by Areamed to Areas.¹⁵⁰ Assuming that Atlantia and Autogrill belong to the same group, Atlantia also provides concession food services on motorway service areas in Spain.

5.1.3.1. Atlantia's views

- (208) Atlantia submits that neither Atlantia nor Abertis can be considered as having any operational involvement in the activities related to concession food services in Spain.¹⁵¹

5.1.3.2. Commission's assessment

- (209) At the level of each motorway service area in Spain, the activities of Abertis (through Areamed) and Atlantia (through Autogrill) do not overlap. Due to the small or medium size of Spanish motorway service areas, only one sub-concessionaire operates services outlets on each service area.¹⁵²
- (210) Furthermore, as shown by the map of Autogrill's and Areamed's sub-concessions in Spain provided by Atlantia,¹⁵³ the food services outlets operated on service areas managed by Areamed are not located in the vicinity of those operated by Autogrill.
- (211) As an exception, Autogrill and Areamed both operate on AP7 around the city of Tarragona. However, since Autogrill's outlets are all located south of Tarragona and Areamed's outlets north of Tarragona,¹⁵⁴ the services provided by Autogrill and Areamed can be seen as substitutable only by drivers entering AP7 before Tarragona and exiting AP7 after Tarragona.¹⁵⁵ Therefore, considering the location of the outlets and the distance between the closest Autogrill's and

¹⁵⁰ Agreed minutes of a conference call with Areas of 31 August 2017, paragraph 5.

¹⁵¹ Form CO, paragraphs 172, 182-183.

¹⁵² Agreed minutes of a conference call with Areas of 31 August 2017, paragraph 13.

¹⁵³ Annex 7.4.1 to the Form CO. For Spain, the map displays the location of [...] food services concessions or outlets for Autogrill (including [...] on AP7) and [...] for Areamed (all on AP7). The map does not display Areamed's outlets located on AP2 from Barcelona to Zaragoza (agreed minutes of a conference call with Areas of 31 August 2017, paragraph 4). This was corrected in Annex 1 to the reply of Atlantia to RFI3 of 29 September 2017. In any case, Autogrill is not present in this zone and Areamed's activities on AP2 are unlikely to overlap with Autogrill's activities at local level.

¹⁵⁴ Autogrill manages [...] food services outlets on the AP7 toll motorway segment from Tarragona to Alicante managed by Aumar (Abertis). Areamed's outlets are located on the AP7 segment from Tarragona to La Jonquera managed by Acesa.

¹⁵⁵ The closest outlets of the Autogrill and Areamed are, on the one side, Autogrill "Hospitalet de l'Infant" outlets (one for each direction), located 35 km south of Tarragona and, on the other side, Areas "Medol" outlets (one for each direction), located 10 km north of Tarragona (reply of Atlantia to RFI3 of 29 September 2017, paragraph 12).

Areamed's outlets (approximately 50 km), the competitive constraint exerted by Autogrill and Areamed on AP7 is limited.¹⁵⁶

- (212) In addition, according to information provided by Atlantia, the closest Autogrill's and Areamed's outlets around the city of Tarragona present differences in terms of opening hours, concepts and dimensions.¹⁵⁷
- (213) If the market for the provision of concession food services on motorway service areas is defined as national, the Transaction would give rise to an affected market in Spain, where Autogrill and the food services outlets on Areamed's service areas respectively hold [10-20]% and [20-30]% of the market (in revenues).¹⁵⁸
- (214) However, as indicated in section 1.2.2, Abertis only exercises an indirect control over the food services outlets located on Areamed's motorway service areas. Indeed, while Abertis jointly controls Areamed, the latter sub-leases the food services facilities to Areas, which has the main responsibility for the operation of the food services outlets.
- (215) Furthermore, based on Atlantia's submission, it seems that there are differentiations if Autogrill's and Areamed's offerings, in particular in terms of opening hours.¹⁵⁹
- (216) Finally, Autogrill and Areamed will still face, post-Transaction, the competition of a number of strong competitors, e.g. Elios (via Areas, the other parent of Areamed),¹⁶⁰ Grupo Abades, Cafestore or Serviáreas 2000.¹⁶¹

5.1.3.3. Conclusion

- (217) In view of the above, and considering notably the geographic coverage of each of Atlantia's (through Autogrill) and Abertis' (through Areamed) outlets, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the provision of concession food services on motorway service areas, under any plausible geographic market definition (local or national).

¹⁵⁶ As recalled by the AGCM, the degree of substitutability of food services outlets decreases with increasing distance from the point of sale; hence distant outlets within the same local geographic market compete less closely (Decision No 8090 of 2 March 2000 in Case C3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*, paragraph 38).

¹⁵⁷ Reply of Atlantia to RFI3 of 29 September 2017, paragraph 14.

¹⁵⁸ Form CO, table on page 78 and reply of Atlantia to RFI4 of 3 October 2017, paragraph 2.

¹⁵⁹ Reply of Atlantia to RFI3 of 29 September 2017, paragraph 14. Areas restaurants [*details over Areas' restaurants business policy*], while Autogrill restaurants [*details over Autogrill's restaurants business policy*].

¹⁶⁰ Elios has, in Spain, [40-50]% of the market for concession food services on motorways (in revenues) if the turnover of food services outlets located on the motorway service areas managed by Areamed are allocated to Elios and [10-20]% if it is allocated to Abertis.

¹⁶¹ Form CO, table page 78. Their shares of the Spanish market for concession food services on motorways (in revenues) are the following: Grupo Abades: [10-20]%; Cafestore: [5-10]%; Serviáreas 2000: [5-10]%.

5.1.4. The provision of ETS / distribution of OBE

5.1.4.1. Atlantia's views

(218) Atlantia considers that the Transaction will not give rise to any concerns related to unilateral effects on the provision of ETS / distribution of OBE in the EEA or at national level, notably due to (i) the Parties' limited position, and (iii) the presence of additional strong competitors.¹⁶²

5.1.4.2. Commission's assessment

(219) The Transaction does not give rise to affected markets, if the market for the distribution of OBE is defined as national.

(220) At EEA level, the Transaction gives rises to affected markets with the Parties' combined market share reaching [30-40]%, and [30-40]% when considering the potential segment for car drivers only. The increment brought about the Transaction is less than [5-10]% ([5-10]% and at most [5-10]% respectively).

(221) Affected markets at EEA level mainly result from the monopoly currently enjoyed by Atlantia in Italy,¹⁶³ which however pre-dates the Transaction and it is therefore not merger-specific.¹⁶⁴ Moreover, the merged entity will face competition, post-Transaction, from a number of other OBE distributors, such as ViaVerde, Vinci, APRR (owned by Eiffage) and Toll Collect with a market share of approximately [10-20]%, [5-10]%, [5-10]% and [0-5]% respectively for all drivers and with ViaVerde, Vinci and APRR also present in the segment for car drivers only with a market share of [10-20]%, [10-20]% and [5-10]%. Finally, with respect to the distribution of OBE for cars, the estimates of the Parties' combined market share in the EEA appears also less relevant as a significant proportion of the number of devices are technically not interoperable and can only be used in a single country.¹⁶⁵

(222) The majority of respondents to the market investigation having expressed an opinion did not raise any concerns with respect to the market for the provision of ETS / distribution of OBE in the EEA and at national level.¹⁶⁶

(223) Finally, Abertis' subsidiary, Eurotoll, [*details on Abertios' Eurotoll business strategy*]. However, other competitors, [...].¹⁶⁷ Absent the Transaction, they

¹⁶² Form CO, pages 126-137.

¹⁶³ Abertis' subsidiary, Eurotoll, [*details on Eurotoll's business strategy*]. However, other competitors, [...] (Form CO, paragraphs 424 and 435). Absent the Transaction, they would therefore be likely to exert a stronger competitive constraint on Atlantia than Abertis (via Eurotoll).

¹⁶⁴ Atlantia, through Telepass, is currently the only distributor of OBE in Italy and thus reaches 100% of the Italian market.

¹⁶⁵ For example, [...].

¹⁶⁶ Replies to question 43 of Q1 – Questionnaire to customers and competitors.

¹⁶⁷ The integration of Eurotoll in Abertis is unlikely to give an advantage to Eurotoll considering that toll motorway concessionaires are under an obligation to contract with all ETS providers in Italy (see reply of Atlantia to RFI5 of 10 October 2017).

would therefore be likely to exert a stronger competitive constraint on Atlantia than Abertis (via Eurotoll).

5.1.4.3. Conclusion

(224) In view of the above, and considering notably (i) the fact that no affected markets arise at national level, (ii) the limited increment and the number/strength of remaining competitors at EEA level, and (iii) the results of the market investigation, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of the market for the provision of ETS / distribution of OBE, under any plausible segmentation.

5.1.5. The provision of ITS equipment or services

5.1.5.1. Atlantia's view

(225) Atlantia considers that the Transaction will not give rise to any concerns related to unilateral effects in the provision of ITS equipment or services in the EEA or at national level, notably due to (i) the Parties' limited position and (iii) the presence of additional strong competitors.

5.1.5.2. Commission assessment

(226) With regard to the overall market for the provision of ITS equipment or services, the proposed Transaction does not give rise to any affected markets both in the EEA and at national level.

(227) On a narrower market for the manufacture of OBE, the proposed Transaction leads to affected markets only in Italy where however the Parties' combined market and the increment brought about the Transaction remain limited (approximately [20-30]% and [0-5]% respectively).

(228) Additional competitors will remain in the market for the provision of ITS equipment or services, post-Transaction, such as Sinelec, Kapsch, and other smaller players.

(229) Finally, the majority of respondents having expressed an opinion to the market investigation did not raise any concerns with respect to the market for the provision of ITS in the EEA and at national level.¹⁶⁸

5.1.5.3. Conclusion

(230) In view of the above, and considering notably (i) the limited position of the Parties in the overall market for the provision of ITS equipment or services as well as in the narrower market for the manufacture of OBE, and (ii) the presence of material competitors, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of the market for the provision of ITS, under any plausible segmentation.

¹⁶⁸ Replies to question 43 of Q1 – Questionnaire to customers and competitors.

5.2. Vertical effects

(231) In this section, the Commission will examine whether the Transaction is likely to result in foreclosure in any of the markets that are vertically affected by the Transaction.

5.2.1. *Legal framework*

(232) According to the Non-Horizontal Merger Guidelines,¹⁶⁹ foreclosure occurs when actual or potential rivals' access to markets is hampered, thereby reducing those companies' ability and/or incentive to compete.¹⁷⁰ Such foreclosure can take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered;¹⁷¹ and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.¹⁷²

(233) For input or customer foreclosure to be a concern, three conditions need to be met post-Transaction: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market (input foreclosure) or on customers (customer foreclosure).¹⁷³ In practice, these factors are often examined together since they are closely intertwined.

5.2.2. *Overview of the vertically affected markets*

(234) The Transaction gives rise to vertical links between the following markets: (i) the grant of food services sub-concessions and the provision of concession food services, (ii) the transport on toll motorways and the provision of ETS / distribution of OBE, (iii) the provision of ITS equipment or services and the transport on toll motorways, (iv) the provision of ITS equipment or services and the provision of ETS / distribution of OBE, and finally (v) the construction of infrastructure and the transport on toll motorways.

(235) Taking account of the Parties' individual or combined market shares exceeding 30%, the following vertically related markets are affected by the Transaction: (i) the grant of food services sub-concessions and the provision of concession food services in Italy and Spain, (ii) the transport on toll motorways and the provision of ETS / distribution of OBE in the EEA, Italy and Spain, (iii) the provision of ITS equipment or services and the transport on toll motorways in Italy and Spain, (iv) the provision of ITS equipment or services and the provision of ETS / distribution of OBE in Italy, and finally (v) the construction of infrastructure and the transport on toll motorways in Italy and Spain.

¹⁶⁹ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the "Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p.7.

¹⁷⁰ Non-Horizontal Merger Guidelines, paragraphs 29-30.

¹⁷¹ Non-Horizontal Merger Guidelines, paragraph 31.

¹⁷² Non-Horizontal Merger Guidelines, paragraph 58.

¹⁷³ Non-Horizontal Merger Guidelines, paragraphs 32 and 59.

5.2.3. *The grant of food services sub-concessions and the provision of concession food services on motorway service areas*

(236) The Commission will assess whether, post-Transaction, (i) the merged entity would likely reduce or stop granting food services sub-concessions to competitors of Atlantia (Autogrill) or Abertis (Areamed) (input foreclosure), and (ii) the merged entity (Autogrill) would likely reduce or stop bidding for being granted food services sub-concessions by motorway concessionaires competing with Atlantia post-Transaction (customer foreclosure).¹⁷⁴

5.2.3.1. Input foreclosure

Atlantia's views

(237) Atlantia submits that it is implausible that the Parties would pursue a strategy of foreclosing food services providers on the motorways they manage, in the hope of favouring a food services provider in which they have an interest.¹⁷⁵

Commission's assessment

(a) Ability

(238) As toll motorway managers, both Atlantia and Abertis grant sub-concessions for the management of motorway service areas, notably for the provision of food services on those service areas. Therefore, the power of the merged entity on the market for the grant of food services sub-concessions corresponds to the power of the merged entity on the management of toll motorways.

(239) Post-Transaction, the merged entity would be the largest toll motorway operator worldwide. While at worldwide and EEA level, its market share would remain below 30% (respectively [5-10]% and [20-30]% based on revenues), the merged entity would, based on the revenues they generate, manage more than 30% of the toll motorways in three EEA countries (Italy, Spain and Poland).¹⁷⁶

(240) More particularly, in Italy, the merged entity would manage [50-60]% of the toll motorway network based on km and [70-80]% based on revenues. The [...] food services concessions or outlets located on Atlantia's and Abertis' motorways represent [50-60]% of the total number of food services concessions or outlets located on Italian motorways.¹⁷⁷ By comparison, the next largest motorway

¹⁷⁴ Since Areamed [*details on Areamed's strategic business policy*], only Autogrill will be taken into account for the purpose of assessing the likelihood of an anticompetitive customer foreclosure scenario.

¹⁷⁵ Form CO, paragraph 256.

¹⁷⁶ In France, Abertis manages [10-20]% of the toll motorway network based on km and [10-20]% based on revenues (Form CO, table on page 73). The [...] food services concessions or outlets located on Abertis' motorways represent [10-20]% of the total number of food services concessions or outlets, to be compared to [40-50]% for those located on Vinci's motorway concessions and [20-30]% for those located on Eiffage's concessions (Form CO, paragraph 229). In this context, the merged entity is unlikely to have a sufficient degree of market power in the market for the grant of food services sub-concessions in France to foreclose Autogrill's competitors from access to sub-concessions.

¹⁷⁷ Form CO, paragraph 229.

concessionaire, Gavio Group, has only [10-20]% of total number of food services outlets located on its motorways.

- (241) Therefore, the merged entity is likely to enjoy a significant degree of market power in the grant of food services sub-concessions in Italy. However, the Transaction has a limited impact on the merged entity's ability to foreclose access to food services sub-concessions on motorway service areas in Italy, since (i) the link between Atlantia's activities in the management of toll motorways and Autogrill's activities on concession food services pre-dates the Transaction, and (ii) the increment brought about by Abertis in the management of toll motorways does not exceed [0-5]% in km and [5-10]% in revenues, representing [...] food services concessions ([5-10]%).
- (242) In Spain, where Atlantia is not present, Abertis manages [40-50]% of the toll motorway network based on km and [70-80]% based on revenues. With [...] food services outlets located on the motorways it manages in Spain, Abertis concentrates on its network [70-80]% of the total number of food services outlets on motorway service areas in Spain.¹⁷⁸ In this context, the merged entity is also likely to enjoy a significant degree of market power in the grant of food services sub-concessions in Spain.
- (243) In Poland, where Abertis is not present, Atlantia manages [10-20]% of the toll motorway network based on km and [30-40]% based on revenues, behind AWSA I & AWSA II ([50-60]% in km and [60-70]% in revenues) and Gdansk Transport Company ([30-40]% in km).¹⁷⁹ It is therefore unlikely that the merged entity will have a sufficient influence on the conditions of competition in the grant of food services sub-concessions to raise prices or degrade quality of food services provided by Autogrill's rivals on motorway services areas. In any case, there is no merger-specific effect, as the vertical link between Atlantia's activities as a grantor of sub-concessions and Autogrill's activities as a grantee of sub-concessions pre-dates the Transaction.
- (244) The results of the market investigation are inconclusive with regard to the question of whether the merged entity, post-Transaction, would likely have the ability to reduce or stop granting food services sub-concessions to competitors of Autogrill or Areamed at national level, in the EEA or in non-EEA countries. While a majority of respondents to the market investigation having expressed an opinion take the view that the merged entity would not have such ability, some competitors insist that integrated concessionaires can and tend to sub-contract with their subsidiaries.¹⁸⁰
- (245) As a conclusion, the Commission considers that the merged entity would have the ability in Italy and Spain to restrict the grant of sub-concessions to Autogrill's competitors, thus to foreclose the latter from the market for the provision of concession food services on Italian and Spanish motorway service areas. In Italy nevertheless, the change in the ability stemming from the Transaction is limited,

¹⁷⁸ Form CO, paragraph 229.

¹⁷⁹ Form CO, table on page 73.

¹⁸⁰ Replies to question 30.1 of Q1 – Questionnaire to customers and competitors; question 28.1 of Q3 – Questionnaire to trade associations.

since (i) there are only [...] service areas located on Abertis motorway network in Italy, out of which [...] are already managed by Autogrill, and (ii) the [...] sub-concessions held by Autogrill will expire in 2025 and 2026, i.e. shortly before the expiry of Abertis' motorway concession on 31 December 2026. There is thus uncertainty as to whether Abertis will remain the grantor of sub-concessions at the end of Autogrill's current sub-concessions.

(b) Incentive

- (246) The Commission has first assessed whether the regulatory framework applicable to the grant of food services sub-concessions by motorway concessionaires in Italy and Spain, complemented by the commitments imposed by the AGCM in Italy (see section 4.2.1.1), is likely to provide significant disincentives to the merged entity's carrying out exclusionary practices against rival food services providers.
- (247) The requirement to grant sub-concessions following open and transparent tender procedures and the scrutiny exercised by ANAS in Italy and by the Ministry of Public Works and Transport in Spain may contribute to reducing the risk that the merged entity distorts the competitive process to favour Autogrill.
- (248) In Italy, the regulatory requirements applicable to all motorway concessionaires are complemented by the commitments imposed on ASPI (Atlantia's subsidiary operating in Italy) by the AGCM, which further reduce the risk that (i) Atlantia would circumvent the obligation to rely on open, transparent and non-discriminatory procedures for the grant of food services sub-concessions on its motorway, and (ii) such illegal conduct would be undetected. As a matter of fact, the share of food services outlets managed by Autogrill on Atlantia's motorway network has decreased from 72% at the time of the acquisition of control by Edizione over ASPI in 2000¹⁸¹ to [40-50]% in 2017.¹⁸² This seems to indicate that, prior to the Transaction, Atlantia did not engage in foreclosure practices, even if in theory it was able to do so.
- (249) Finally, the Transaction does not give rise to any significant additional incentive for the merged entity to engage in an input foreclosure strategy, since the [...] service areas located on Abertis' network in Italy represent less than [10-20]% of the total number of service areas currently located on Atlantia's network in Italy.
- (250) In view of the obligations imposed on Atlantia under the Italian law and the commitments imposed by AGCM, and of the limited incremental incentive created by the addition of Abertis' motorway network, the Commission considers that the merged entity is likely not to have the incentive to foreclose Autogrill's competitors from access to sub-concessions in Italy.
- (251) Nevertheless, the additional safeguard measures offered by the commitments imposed by the AGCM do not exist in Spain, while the Transaction would result in the vertical integration of the largest motorway concessionaire (Abertis) with the second largest food services sub-concessionaire (Autogrill).

¹⁸¹ Decision No 8090 of 2 March 2000 in Case C3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*, paragraph 67.

¹⁸² Form CO, paragraph 230.

- (252) In addition, the merged entity may have an economic incentive to discriminate against Autogrill's competitors and to grant the sub-concessions mainly or exclusively to Autogrill. The revenues drawn by motorway concessionaires for sub-conceding services on motorway services are generally calculated as a percentage of the turnover generated by the sub-concessionaires.¹⁸³ This implies, on the one hand, that both the concessionaires and sub-concessionaires have an interest in maximising revenues deriving from the provision of sub-conceded services. This interest is further reinforced by the Transaction, which would result in the integration of Abertis and Autogrill in the same group, hence in the internalisation of the profit margins obtained by Autogrill in the sale of food services to users of Abertis' motorways.
- (253) On the other hand, the interest of the concessionaires and sub-concessionaires diverge with regard to the percentage of the turnover generated by the sub-concessionaires (i.e. the level of fees) to be paid by the latter to the concessionaires in exchange for the right to operate on motorway service areas. However, the Transaction would remove that divergence, since, following the integration of Autogrill and Abertis within the same group, the fees paid by Autogrill would remain within the same group, and the entire turnover generated by sub-conceded services, including the fees due to Abertis by Autogrill as a sub-concessionaire, would be allocated to the merged entity. This also means that Autogrill may have an incentive to propose high percentages to remunerate Abertis and to outbid its competitors in the framework of the tender procedures for sub-concessions on Abertis' motorway network, since those fees would not be cashed out of the merged entity's group.¹⁸⁴
- (254) The results of the market investigation are insufficiently clear to exclude that the merged entity may have, post-Transaction, an incentive to reduce or stop granting food services sub-concessions to competitors of Autogrill or Areamed (i.e. that it may be profitable for the merged entity to do so) in Spain.¹⁸⁵
- (255) As a conclusion, the Commission does not rule out the possibility that, despite the regulatory framework applicable to the award of motorway sub-concessions, the merged entity may have an incentive in Spain to restrict the grant of sub-concessions to Autogrill's competitors, thus to foreclose the latter from the market for the provision of concession food services on Spanish motorway service areas.

(c) Effects

- (256) The results of the market investigation are not sufficiently clear to form a view as to the effects of an input foreclosure strategy implemented by the merged entity on the market for concession food services on motorway service areas.¹⁸⁶

¹⁸³ In Spain, Abertis is typically remunerated through [*details of Abertis' remuneration scheme*] (reply of Atlantia to RF13 of 29 September 2017, paragraph 6 and Annex 2).

¹⁸⁴ Due to the shareholding structures of Autogrill, in which Edizione only holds 50.1% and in Atlantia, in which Edizione would hold less than [30-40]% post-Transaction, any incentive to foreclose may encounter the opposition of the other shareholders of either of Autogrill or Atlantia. This also applies to Italy.

¹⁸⁵ Replies to question 30.2 of Q1 – Questionnaire to customers and competitors.

¹⁸⁶ Replies to questions 30.3, 41-43 of Q1 – Questionnaire to customers and competitors.

- (257) Nevertheless, even if the merged entity were to have the ability and incentive to restrict access to food services sub-concessions on its motorway network in Spain, the Commission deems that the effects of such attempts on the market for the provision of concession food services on motorway service areas would be limited.¹⁸⁷
- (258) First, in Spain, there is limited competition after the grant of sub-concessions, since, in general, only one sub-concessionaire operates on a given motorway concession. In addition, the end of the current food services sub-concessions located on the motorways managed by Abertis corresponds to the end of the motorway concessions granted Abertis.¹⁸⁸
- (259) Therefore, Abertis will not grant food services sub-concessions before the end of its motorway concessions. At that time, there is uncertainty as to whether Abertis will be renewed as the motorway concessionaire, notably considering (i) that the concessions are tendered out through an open tendering procedure to which all interested companies/consortia can participate, and (ii) the statements in Abertis' internal documents about its strategy, [*details about Abertis' business strategy*]. It is thus uncertain that Abertis' current market power on the market for the grant of food services sub-concessions in Spain would be maintained at the expiry of the current motorway concessions, when new food services sub-concessions are to be granted.
- (260) Furthermore, the effects of an input foreclosure strategy, if any, would only materialise at the earliest in 2018 (first expiry date of Abertis' motorway concessions) and at the latest in 2055 (last expiry date of Abertis' motorway concessions), noting that most of the motorway service areas on Abertis' largest concessions in km (Aumar and Acesa), expiring respectively in 2019 and 2021, are already managed by Autogrill and Areamed.¹⁸⁹
- (261) Second, Autogrill and Areamed already operate [...] out of the [...] outlets located on Abertis' motorway network in Spain ([50-60]%), for an annual turnover of EUR [...] ([80-90]%).¹⁹⁰ Therefore, Autogrill's economies of scale (notably in relation to purchases) that would result from the management of the additional [...] outlets, generating an annual turnover of approximately [...], are to be put in perspective and compared to the scale of Autogrill's competitors. In particular, Elixor (via Areas) and Abades are well established on the market for the provision of concessions food services on motorway service areas in Spain.¹⁹¹ The advantages derived from Autogrill's expansion on Abertis' motorway network in terms of efficiency and competitiveness are unlikely to be sufficient to undermine its competitors.

¹⁸⁷ There is no need to assess the potential effects of input foreclosure in Italy, considering that, as indicated in sections (a) and (b) above, Atlantia has not implemented such a strategy before the Transaction, while the Transaction has a limited impact on the merged entity's ability and incentive to engage in an input foreclosure strategy.

¹⁸⁸ Reply of Atlantia to RFI3 of 29 September 2017, paragraph 11.

¹⁸⁹ Form CO, table on page 62.

¹⁹⁰ Form CO, Annex 7.4.2 and reply of Atlantia to RFI4 of 3 October 2017, paragraph 1.

¹⁹¹ Form CO, table on page 78 and reply of Atlantia to RFI4 of 3 October 2017, paragraph 1.

(262) Third, according to Atlantia, [...] out of the [...] outlets on Abertis' motorway network in Spain not operated by Autogrill or Areamed are operated by Elicor (via Areas), for an annual turnover of approximately EUR [...].¹⁹² The turnover generated by Elicor (excluding Areamed) on Abertis' motorway network represents around [...] of the total turnover of Elicor (excluding Areamed) on the motorway segment in Spain. Nevertheless, this share falls to less than [10-20]% taking account of Elicor's turnover on the motorway segment in Spain and France and taking account of Elicor's turnover on the overall transport sector in Spain.¹⁹³ In view of its market position and financial strength, Elicor is unlikely to be weakened or forced out of the market for the provision of concession food services.¹⁹⁴

(263) The Commission therefore finds that, even if the merged entity were to have the ability and an increased incentive to foreclose Autogrill's rivals from access to sub-concessions post-Transaction, this would be unlikely to lead to significant harm to effective competition on the market for the provision of concession food services on motorway service areas in Spain.

(d) Conclusion

(264) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with regard to access to sub-concessions on motorway service areas (input) by concession food services providers.

5.2.3.2. Customer foreclosure

Atlantia's views

(265) Atlantia submits that it does not directly or indirectly control Autogrill; therefore it has neither the ability nor the incentive to direct Autogrill not to operate on third parties' concessions.¹⁹⁵

Commission's assessment

(a) Ability

(266) For customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.¹⁹⁶ The market share of the merged entity (through Autogrill¹⁹⁷) on the provision of concession food services on motorway

¹⁹² Form CO, Annex 7.4.2 and reply of Atlantia to RFI4 of 3 October 2017, paragraph 1.

¹⁹³ Form CO, tables on pages 77-78.

¹⁹⁴ Elicor is the leader in Spain for the provision of concession food services both on the motorway service areas (market share based on revenues: [40-50]%) and at all transport-related locations (market share at airports, motorways and railways: [40-50]%).

¹⁹⁵ Form CO, paragraph 255.

¹⁹⁶ Non-Horizontal Merger Guidelines, paragraph 61.

¹⁹⁷ Areamed [*details on Areamed's business strategy*].

service areas would exceed 30% only in Italy, where Autogrill holds [60-70]% of the market (in revenues).

- (267) There are however alternative food services providers that could bid for the food services sub-concessions to be granted by the merged entity's competitors in Italy. In particular, the Commission notes that the groups Cremonini (Chef Express), Elios (My Chef) and Lagardère (Ristop) are not only present in the provision of concession food services on motorway services areas in Italy, but are also significant players at all transport-related locations in Italy.¹⁹⁸ They would thus have the ability (financial capacity, know-how and experience) to compete for the sub-concessions to be granted by motorway concessionaires competing with the merged entity.
- (268) All respondents to the market investigation having expressed an opinion consider that Autogrill would likely not have, post-Transaction, the ability to reduce or stop bidding for food services sub-concessions by motorway concessionaires competing with the merged entity in Italy.¹⁹⁹

(b) Incentive

- (269) Even if Autogrill were to have the ability to foreclose the access of rival motorway concessionaires to the provision of concession food services on motorway service areas (*quod non*), the Commission considers that they would have no incentive to engage into such a strategy.
- (270) First, Autogrill generates annually EUR [...] of revenues with competitors of Atlantia and Abertis,²⁰⁰ which approximately corresponds to the turnover generated by other food services providers on the motorways managed by Atlantia and Abertis in Italy (EUR [...]).²⁰¹ In a possible customer foreclosure strategy, in order not to forego revenue, Autogrill would need to replace in full the turnover generated with third party motorway concessionaires by the turnover generated with the merged entity. To do so, Autogrill would have to manage all of the food services outlets located on the merged entity's motorways. This is not authorised under the commitments imposed by the AGCM, which entitles Autogrill to manage up to 72% of those outlets.
- (271) Second, it is unlikely that the merged entity could compensate for the losses in Autogrill's revenues by obtaining more advantageous conditions from public authorities upstream or increasing prices to motorway users for food services downstream. Due to the regulatory framework and the level of competition for the grant of motorway concessions, it seems that no economic benefit on the market for the management of motorway concessions could be drawn from Autogrill's customer foreclosure strategy by the merged entity. In addition, on the market for the provision of concession food services, Autogrill will still be subject to the

¹⁹⁸ Form CO, tables on pages 77-78.

¹⁹⁹ Replies to question 31.1 of Q1 – Questionnaire to customers and competitors.

²⁰⁰ This represents [30-40]% of Autogrill's turnover on motorway services areas.

²⁰¹ Form CO, Annex 7.4.2.

competitive constraint exerted by its competitors, including on Atlantia's and Abertis' motorways.²⁰²

(272) Third, the Transaction has a limited impact on Autogrill's incentive to engage in a customer foreclosure strategy in Italy, since there are only [...] services areas on the motorways managed by Abertis, out of which [...] are already managed by Autogrill.²⁰³

(273) A majority of respondents to the market investigation having expressed an opinion confirm that Autogrill would likely not have, post-Transaction, any incentive to reduce or stop bidding for being granted food services sub-concessions by motorway concessionaires competing with the merged entity in Italy.²⁰⁴

(c) Effects

(274) Even if Autogrill were to have the ability and incentive to foreclose the access of rival motorway concessionaires to food services providers (*quod non*), the Commission considers that such a strategy would have no adverse impact on competition on the market for the provision of concession food services on motorway service areas. In particular, motorway concessionaires would not be put at a disadvantage if Autogrill were to provide services only in-house and the competitiveness of Autogrill's rivals would not be lessened.

(275) A majority of respondents to the market investigation having expressed an opinion indicate that there would likely be no impact on competition for the transport on toll motorways if Autogrill, post-Transaction, was to reduce or stop bidding for being granted food services sub-concessions by motorway concessionaires competing with the merged entity in Italy.²⁰⁵ As a consequence on the absence of impact on the upstream market, rivals on the downstream market are unlikely to be put at a competitive disadvantage.²⁰⁶

(d) Conclusion

(276) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with regard to access to concession food services providers (customers) by motorway concessionaires.

²⁰² According to Atlantia, in Italy, there are several food services concessions granted to several food services providers under one single motorway concession (and possibly in one single motorway service area) (Form CO, paragraph 379).

²⁰³ Form CO, paragraph 231 and Annex 7.4.2. In Italy, Autogrill achieves an annual turnover of EUR [...] on the motorway services areas located on Abertis' network and represents already [60-70]% of the sales of food services on Abertis' network.

²⁰⁴ Replies to question 31.2 of Q1 – Questionnaire to customers and competitors.

²⁰⁵ Replies to question 31.3 of Q1 – Questionnaire to customers and competitors.

²⁰⁶ Non-Horizontal Merger Guidelines, paragraph 72.

5.2.3.3. Conclusion

(277) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market due to its vertical effects on the market for the provision of concession food services on motorway service areas.

5.2.4. *The transport on toll motorways and the provision of ETS / distribution of OBE*

(278) The Commission will assess whether post-Transaction, (i) the merged entity would have the ability and incentive to restrict the access of potential entrants to OBE distribution, as Atlantia, through Telepass, already has 100% of OBE distribution pre-Transaction (input foreclosure), and (ii) Atlantia would have the ability and incentive to reduce or stop contracting with competitors of Atlantia or Abertis for the provision of ETS (customer foreclosure).

5.2.4.1. Input foreclosure

Atlantia's views

(279) Atlantia submits that it is implausible that the Parties would pursue a strategy of foreclosing third-party OBE distributors, post-Transaction, lacking any ability or incentive to engage in such strategy.²⁰⁷

Commission's assessment

(a) Ability

(280) On the upstream market for the transport on toll motorways, at worldwide and EEA level, the merged entity would have limited market shares post-Transaction. However, in Italy the Parties' combined market share reaches [70-80]% based on revenues and [50-60]% based on km. In addition, in Spain, while Atlantia is not present, Abertis' market share is approximately [70-80]% based on revenues and [40-50]% based on km.²⁰⁸

(281) The results of the market investigation are inconclusive with regard to the question of whether the merged entity, post-Transaction, would likely have the ability to reduce or stop contracting with potential competitors of Telepass, Bip&Go, Bip&Drive or Eurotoll for the provision of ETS at national level. While a majority of respondents to the market investigation having expressed an opinion takes the view that the merged entity would not have such ability, others do not exclude the Parties' ability to engage in such a foreclosure strategy, notably by favouring the companies belonging to the merged entity's group.²⁰⁹

The Commission considers that, in view of the Parties' important position on the upstream market for exploitation of toll motorway concessions in Italy and Spain, the merged entity is likely to enjoy a significant degree of market power and to

²⁰⁷ Form CO, page 87.

²⁰⁸ In Poland, Atlantia has a market share of [30-40]% based on revenues. However, it is not merger specific as no new link is brought about by the Transaction.

²⁰⁹ Replies to question 36 of Q1 – Questionnaire to customers and competitors.

have the ability to foreclose potential OBE distributors from the downstream market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(b) Incentive

- (282) The majority of respondents having expressed an opinion during the market investigation indicate that the merged entity, post-Transaction, would not have the incentive to reduce or stop contracting with potential competitors of Telepass, Bip&Go, Bip&Drive or Eurotoll for the provision of ETS both in the EEA and at national level.²¹⁰ One respondent to the market investigation expressed the concern that in Italy, due to Atlantia's dominant position and the increment brought about by the Transaction in the upstream market for toll motorways, it would become very difficult for potential competitors of the merged entity downstream to have access to toll motorways.
- (283) In Italy, the Commission considers that the Parties' incentive to engage in a foreclosure strategy by restricting access of potential OBE distributors is unlikely for the following reasons.
- (284) First, engaging in a foreclosure strategy would make limited business sense as concessionaires intend to maximise the volumes of vehicles on their motorways and the revenues from collecting motorway tolls. Second, Atlantia's important position in Italy already exists pre-Transaction and the incremental effect brought about the Transactions, notably the addition by Abertis to Atlantia, remains limited. In addition, the Commission has recognised already in prior decisions that motorway concessionaires have no incentive to foreclose third-party existing and future providers of ETS / OBE distributors.²¹¹ Finally, OBE distribution is governed by legal rules ensuring access in an open and non-discriminatory way, through technologies which comply with open and public rules available to all manufacturers and distributors on a non-discriminatory basis.²¹² Such clear legal obligations may thus provide disincentives for the merged entity to engage in illegal conducts which could be easily identified and sanctioned.²¹³
- (285) The Commission considers that, in view of the legal obligation to refrain from discriminating any OBE distributor, the limited incremental effect brought about the Transactions, the fact that a potential foreclosure strategy appears to be unprofitable, the Parties will likely not have an incentive to foreclose OBE distributors from the downstream market for the distribution of OBE devices, by

²¹⁰ Replies to question 36 of Q1 – Questionnaire to customers and competitors, Q2 - Questionnaire to granting authorities and Q3 – Questionnaire to trade association.

²¹¹ Case M.7075 – *Cintra/Abertis/Itinere/Bip&Drive JV*.

²¹² See Directive 2004/52/EC, notably its Article 4, and Decision 2009/750/EC on the interoperability of electronic road toll systems in the Community, notably its Article 5(3). See also the Commission's Proposal (to recast Directive 2004/52/EC) for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union – May 2017. As a result, once an operator has fulfilled the preliminary certification/authorisation step, toll motorway concessionaires, including Atlantia and Abertis, are therefore under an obligation to negotiate in good faith and on a non-discriminatory basis with all ETS providers. See reply of Atlantia to RFI5 of 10 October 2017.

²¹³ Non-Horizontal Merger Guidelines, paragraph 46.

restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(c) Effects

(286) As regards the overall likely impact on competition in Italy, the Commission considers that the vertical integration of Atlantia and Abertis will likely not give rise detrimental effects in the downstream market for the provision of ETS / distribution of OBE, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.

(287) The majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition for the provision of ETS / distribution of OBE in the EEA and at national level should the merged entity engage an input foreclosure strategy post-Transaction.²¹⁴

(d) Conclusion

(288) Based on the above, and considering all evidence available to it, the Commission concludes that while the Parties seem to have the ability to engage in a foreclosure strategy to restrict the access of other OBE distributors post-Transaction, their incentive to engage in such a strategy remains unlikely and any effect on the downstream market for the provision of ETS / distribution of OBE could be excluded.

5.2.4.2. Customer foreclosure

Atlantia's views

(289) Atlantia submits that it is implausible that the Parties would pursue a strategy of foreclosing third-party motorway concessionaires post-Transaction, lacking any ability or incentive to engage in such strategy.²¹⁵

Commission's assessment

(a) Ability

(290) At EEA level, the Parties' combined market share is at most [30-40]% (with an increment of less than [5-10]%) and only when considering the narrowest product market definition, namely the distribution of OBE for car drivers only. In Italy, Atlantia, through Telepass, is the sole provider of ETS and OBE, serving more than 20 concessionaires. On the other hand, Atlantia's position in Spain and France is insignificant on this market.

(291) The Commission considers that, in view of Atlantia's monopoly position in Italy, the merged entity will likely have the ability to reducing or stopping contracting for the provision of ETS / distribution of OBE with motorway concessionaires.

(b) Incentive

²¹⁴ Replies to question 36.3 of Q1 - Questionnaire to customers and competitors.

²¹⁵ Form CO, page 87.

- (292) In Italy, the Commission considers that Atlantia's incentive to engage in a customer foreclosure strategy by reducing or stopping contracting, for the provision of ETS, with motorway concessionaires post-Transaction, would be unlikely. First, once a new toll motorway concession has been granted to a rival operator, it seems in the Parties' interest to allow Telepass to work on that motorway. In this respect, it is unlikely that the Parties will sacrifice Telepass' profits from servicing a motorway whose concession may last several years just to weaken a third-party concessionaire in a future tender. In addition, while already enjoying a monopoly position pre-Transaction, Atlantia's has not followed such strategy in the past and it is unlikely that its behaviour will change in the future. Finally, any additional incentive to foreclose third parties bidders as a result of the integration with Abertis remains limited.
- (293) The majority of respondents to the market investigation confirms that, post-Transaction, the Parties' incentive to reduce or stop contracting, for the provision of ETS, with motorway concessionaires competing with Atlantia and Abertis in the EEA and at national level is highly improbable.²¹⁶
- (294) The Commission considers that, in view of the legal obligation to refrain from discriminating any OBE distributor, the limited incremental effect brought about the Transactions, the fact that a potential foreclosure strategy appears to be unprofitable, the Parties will likely not have an incentive to foreclose OBE distributors from the downstream market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(c) Effects

- (295) As regards the overall likely impact on competition, the Commission considers that the integration of Atlantia and Abertis will not give rise to detrimental effects in the downstream market for the provision of ETS / distribution of OBE, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (296) A majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in the EEA and at national level for the transport on toll motorways should the merged entity engages in a customer foreclosure strategy post-Transaction.²¹⁷

5.2.4.3. Conclusion

- (297) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy by contractual means, for the provision of ETS, with third-party motorway concessionaires would be unlikely as a result of the proposed Transaction.

²¹⁶ Replies to question 37 of Q1 – Questionnaire to customers and competitors.

²¹⁷ Replies to question 37.3 of Q1 – Questionnaire to customers and competitors.

5.2.5. The provision of ITS equipment or services and the transport on toll motorways

(298) The Commission will assess whether, post-Transaction, Atlantia would have the ability and incentive to restrict access from Atlantia's and Abertis' motorways networks to competing providers of ITS equipment or services (customer foreclosure).²¹⁸

5.2.5.1. Customer foreclosure

Atlantia's views

(299) Atlantia submits that it is implausible that the Parties would pursue a strategy of foreclosing third-party ITS' providers post-Transaction lacking any ability and/or incentive to engage in such strategy.²¹⁹

Commission's assessment

(a) Ability

(300) In Italy (the merged entity and mainly Atlantia) and in Spain (Abertis), the Parties hold a strong position on the market for exploitation of toll motorway concessions (see paragraphs 271-273 above). As a result, the Commission considers that the merged entity, post-Transaction, is likely to enjoy a significant degree of market power on the market for exploitation of toll motorway concessions in Italy and Spain and likely have the ability to foreclose ITS providers.

(b) Incentive

(301) The majority of respondents who expressed an opinion during the market investigation indicate that the merged entity, post-Transaction, would not have the incentive to reduce or stop contracting with competitors of Autostrade Tech, A4 Mobility and Emovis for the provision of ITS equipment or services in the EEA and at national level.²²⁰ One respondent to the market investigation expressed concerns that, in Italy, Atlantia's and Abertis subsidiaries will become the merged entity's only suppliers for any ITS equipment and therefore stop contracting with other vendors which will be foreclosed from the market for the provision of ITS.

(302) The Commission considers that the Parties' incentive to engage in such a foreclosure strategy, notably in Italy, is unlikely for the following reasons.

(303) First, in Italy, Article 177 of legislative decree No. 50/2016 transposing the EU Concession Directive (in force since 19 April 2016) introduced the obligation for

²¹⁸ As regards the provision of ITS equipment or services, Atlantia's Autostrade Tech and Abertis' A4 mobility (both active in Italy) mainly operate on infra-group basis and have a marginal presence at EEA level (approximately [5-10]%). Abertis also controls Emovis (active in a number of countries, but not in Spain) which serves mainly third-parties. Out of the combined revenues of these three companies (EUR [...]), approximately [...] % is generated in-house. As result, in view of the Parties' subsidiaries in-house operations and their weak position on the merchant market in Italy and Spain, the Commission considers that the implementation of any input foreclosure strategy remains unlikely.

²¹⁹ Form CO, page 87.

²²⁰ Replies to question 36 of Q1 - Questionnaire to customers and competitors, Q2 - Questionnaire to granting authorities and Q3 - Questionnaire to trade association.

the motorway concessionaire to award 80% of the contracts for works, supplies and services exceeding EUR 150 000 through a public tender procedure. Consequently, in Italy, for 80% of the contracts to be awarded by Atlantia post-Transaction, direct awarding (without a public procurement procedure) to intra-group companies is precluded. As a result, the Commission considers that the regulatory framework applicable to the grant of the contracts for works, supplies and services in Italy is likely to provide material disincentives for the Parties' to engage in any foreclosure strategy.

- (304) Second, in addition, considering that in Italy Atlantia purchases approximately [...] % of ITS equipment/services from external suppliers, which have been selected through bidding procedures benefiting from lower costs of more efficient suppliers, by giving preferential treatment, post-Transaction, to its in-house ITS providers, the merged entity would likely incur additional costs.
- (305) Finally, while already enjoying an important position pre-Transaction in the market for the transport on toll motorways, Atlantia's has not followed such strategy in the past and it is unlikely that its behaviour will change in the future as a result of the limited increment brought about by the Transaction.

(c) Effects

- (306) As regards the overall likely impact on competition, the Commission considers that the integration of Atlantia and Abertis will not give rise to detrimental effects in the downstream market for the transport of toll motorway, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (307) The majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in the EEA and at national level for the provision of equipment or services for ITS if the merged entity would, post-Transaction, engage in a customer foreclosure strategy.²²¹ As a consequence of the absence of impact on the upstream market, rivals on the downstream market are unlikely to be put at a competitive disadvantage.

5.2.5.2. Conclusion

- (308) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy by contractual means in order to exclude ITS providers from the market would be unlikely as a result of the proposed Transaction.

²²¹ Replies to question 39.3 of Q1 – Questionnaire to customers and competitors.

5.2.6. The provision of ITS equipment or services and the provision of ETS / distribution of OBE

(309) The Commission will assess whether, post-Transaction, the merged entity would have the ability and incentive to restrict access to competing manufacturers of OBE for the provision of ITS equipment (customer foreclosure).²²²

5.2.6.1. Customer foreclosure

Atlantia's view

(310) Atlantia submits that it is implausible that the Parties would pursue a strategy of foreclosing third-party ITS' providers post-Transaction lacking any ability and/or incentive to engage in such strategy.

Commission's view

(a) Ability

(311) In Italy, Atlantia, through Telepass, is the sole provider of ETS and OBE, serving more than 20 concessionaires. On the other hand, Atlantia's position in Spain and France is insignificant.

(312) The Commission considers that, in view of Atlantia's monopoly position in Italy, the merged entity will likely have the ability to reducing or stopping contracting for the provision of ETS / distribution of OBE with motorway concessionaires.

(b) Incentive

(313) In Italy, the Commission considers that, post-Transaction, Atlantia's incentive to engage in a customer foreclosure strategy, by reducing or stopping contracting, for the provision of ITS, with OBE manufacturers, remains unlikely, notably as (i) Atlantia's Telepass [*details of Telepass' business policy*] (accounting for EUR [...] in 2016) and (ii), according to Atlantia, [*details of Abertis' business policy*], with their 2016 purchases amounting to less than EUR [...], a small percentage of [*supplier's name*] revenues. Therefore, no OBE manufacture / ITS providers would be significantly affected by a customer foreclosure strategy by Telepass or Abertis' subsidiaries. This seems to be confirmed by the fact that the majority of the respondents to the market investigation having expressed an opinion raised no concerns with regards to the Parties' incentive to foreclose OBE manufacturer as a result of the proposed Transaction.²²³

(c) Effects

(314) As regards the overall likely impact on competition, the Commission considers that the integration of Atlantia and Abertis will not give rise to detrimental effects in the downstream market for the provision of ETS / distribution of OBE, notably

²²² As the Parties' combined market shares in the market for the manufacture of OBE is less than [20-30]% at national level, the Commission considers that the implementation of any input foreclosure strategy remains unlikely.

²²³ Replies to question 38, 39 and 43 of Q1 – Questionnaire to customers and competitors.

as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.

- (315) The majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in the EEA and at national level for the provision of ITS, including the manufacture of OBE in Italy should the merged entity engage in a customer foreclosure strategy post-Transaction.²²⁴ As a consequence on the absence of impact on the upstream market, rivals on the downstream market are unlikely to be put at a competitive disadvantage.²²⁵

5.2.6.2. Conclusion

- (316) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy by contractual means in order to exclude OBE manufacturers would be unlikely.

5.2.7. *The construction of infrastructure and the transport on toll motorways*

- (317) The Commission will assess whether, post-Transaction, the merged entity would have the ability and incentive to restrict access from Atlantia's and Abertis' motorways networks to building companies (customer foreclosure).²²⁶

5.2.7.1. Customer foreclosure

Atlantia's views

- (318) According to Atlantia, it is implausible that the Parties would pursue a strategy of seeking to weaken third-party suppliers of construction services in order to favour their own integrated operations (Atlantia's Pavimental and Spea).

Commission's assessment

(a) Ability

- (319) In Italy (the merged entity and mainly Atlantia) and in Spain (Abertis), the Parties hold a strong position on the market for exploitation of toll motorway concessions (see section 5.1.1). As a result, the Commission considers that the merged entity, post-Transaction, is likely to enjoy a significant degree of market power on the market for exploitation of toll motorway concessions in Italy and Spain and likely have the ability to foreclose third party suppliers of construction services.

²²⁴ Replies to question 39.3 of Q1 – Questionnaire to customers and competitors.

²²⁵ Non-Horizontal Merger Guidelines, paragraph 72.

²²⁶ While Abertis is not present at all in infrastructure construction, having recently sold its indirect controlling stake in Serenissima Costruzioni, in Italy Atlantia has a marginal presence through Pavimental, which mainly operates in road paving and maintenance and is essentially designed to satisfy internal needs of the group ([...] % of its turnover) Similarly, as regards Spea, it also provide engineering services mainly infra-group ([...] % of its turnover). In addition, both Pavimental and Spea, whose vertical link pre-dates the Transaction, have only a marginal presence outside Italy – approximately EUR [...] in the EEA and are not active in countries where Abertis has a significant presence. As a result, due to Atlantia's limited position in infrastructure construction, the Commission considers that the implementation of any input foreclosure strategy remains unlikely.

(b) Incentive

- (320) The Commission considers that, post-Transaction, the merged entity's incentive to engage in a foreclosure strategy by reducing or stopping contracting with third-parties' supplier of construction services remains unlikely.
- (321) First, the Parties, as motorway concessionaires, account for a negligible portion of the demand for infrastructure works at EEA level under any plausible market definition. Second, the awarding of construction contracts by motorway concessionaires is regulated by EU and national laws (see section 4.5.1), which are likely to provide significant disincentives for the Parties' engage in any foreclosure strategy by excluding potential bidders for works on its motorways. Finally, the majority of the respondents to the market investigation having expressed an opinion indicated that, post-Transaction, any incentive of the Parties to reduce or stop contracting with competitors of Pavimental or Spea for infrastructure construction remains limited, notably due to limited impact brought about the Transaction in the construction of motorway infrastructure.²²⁷

(c) Effects

- (322) As regards the overall likely impact on competition, the Commission considers that the integration of Atlantia and Abertis will not give rise to detrimental effects in the downstream market for the construction and maintenance of motorway infrastructure, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (323) A majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in Italy for the construction of infrastructure, should the merged entity engage in a customer foreclosure strategy post-Transaction.²²⁸

(d) Conclusion

- (324) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy by third-party contractual means in order to exclude third-party suppliers of construction services seems unlikely.
- (325) Atlantia's construction and engineering subsidiaries are relatively small (representing together [*an irrelevant percentage*] of the EEA road infrastructure segment), and work almost uniquely to satisfy Atlantia's requirements (over [...] % of their revenues are made out of in-house services), the Commission believes that the foreclosure of rival construction companies would be unlikely.

5.3. Conglomerate effects

- (326) In this section, the Commission will examine whether the Transaction, which brings together Atlantia's and Abertis' toll payment services, could lead to conglomerate effects.

²²⁷ Replies to question 40.2 of Q1 - Questionnaire to customers and competitors.

²²⁸ Replies to question 40.3 of Q1 – Questionnaire to customers and competitors.

(327) In particular, the Commission will assess whether the merged entity would have the ability and incentive to leverage its position from the market for the provision of ETS to the other payment services (e.g. payment of transport-related services such as parking, fuel, other services at motorway services areas, access fees to cities, airports and ports, use of vehicles, transport fees), in order to prevent other vendors from providing those services.

5.3.1. Legal framework

(328) According to the Non-Horizontal Merger Guidelines, the main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices. Tying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.²²⁹

(329) In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers. In practice, these factors are often examined together as they are closely intertwined.²³⁰

5.3.2. Atlantia's views

(330) Atlantia submits that the Transaction cannot have any effect in markets for payment services other than tolling services.²³¹

5.3.3. Commission's assessment

5.3.3.1. Ability

(331) In order to be able to foreclose competitors, the new entity must have a significant degree of market power in one of the markets concerned.²³² At EEA level, the Parties' combined market share reaches [30-40]% on the provision of ETS and [30-40]% when considering the potential segment for car drivers only. As indicated in section 5.1.4, due notably to the strength of the remaining competitors at EEA level, the Transaction does not give the merged entity a sufficient degree of market power to successfully foreclose its competitors by tying or bundling toll payment services with other payment services at EEA level.

²²⁹ Non-Horizontal Merger Guidelines, paragraph 93.

²³⁰ Non-Horizontal Merger Guidelines, paragraph 94.

²³¹ Reply of Atlantia to RFI2 of 22 September 2017, paragraph 12.

²³² Non-Horizontal Merger Guidelines, paragraph 99.

- (332) Likewise, in Spain and France, where Atlantia (through Telepass) is marginally present, the Parties' combined market shares are below 20% under any possible segmentation.²³³ Therefore, the merged entity appears unable have a sufficient market power to foreclose competitors by tying or bundling its electronic payment services in Spain or in France.²³⁴
- (333) In Italy, Atlantia (through Telepass) holds 100% of the market for electronic toll payment in Italy. In addition, Telepass' services extend beyond toll services and include payment of certain parking services, access charges to Milan city centre, one ferry transport services and, as from July 2017, fuel services in certain service areas.²³⁵ This situation pre-dates the Transaction, which, therefore, has no impact on Atlantia's existing ability to leverage its monopolistic position on ETS to other payment services in Italy.
- (334) The Transaction nevertheless results in two changes, which have to be taken into account to assess the likelihood of conglomerate effects.
- (335) The first change is that the merged entity would have a larger customer base for ETS, combining Atlantia's customer base in Italy, and Abertis' customer base in Spain and France, served through Eurotoll, Bip&Drive and Bip&Go. Therefore, the Transaction gives the merged entity a better access to Abertis' customers, which increases its ability to sell the other payment services developed by Atlantia. In addition, a respondent to the market investigation indicated that, with such a broad customer base, the cost of extending services beyond tolls is negligible and therefore would not represent an obstacle to engage in such a business conduct.²³⁶
- (336) However, the finding that the Transaction facilitates the sale of tied or bundled electronic payment services does not imply that the merged entity would have an increased ability to foreclose competitors. First, the key element giving an undertaking the ability to foreclose competitors is a significant degree of market power. In this regard, the Transaction has a limited impact on the Parties' market power in Italy (where Abertis is not active), in Spain and in France (where Atlantia is marginally present). Second, one of conditions for foreclosure to be a potential concern is that there is a large common pool of customers for the individual products concerned.²³⁷ In this case, [*details of internal Atlantia's business considerations*].²³⁸ Third, rivals may counter a bundling strategy by offering bundles themselves or by pricing more aggressively.²³⁹ In particular,

²³³ Form CO, paragraphs 235-236.

²³⁴ According to Atlantia, Abertis's Bip&Go and Bip&Drive also offer payment services other than tolls. However, their share is negligible and limited to the possibility of the users to pay certain parking services.

²³⁵ Reply of Atlantia to RFI2 of 22 September 2017, paragraph 14.

²³⁶ Reply to question 42.1 of Q1 - Questionnaire to customers and competitors.

²³⁷ Non-Horizontal Merger Guidelines, paragraph 100.

²³⁸ Form CO, Annex 5.4.1.C, Presentation "Abertis Infraestructuras S.A: Deliberazioni inerenti e conseguenti", 12 May 2017. In particular, slide 10 refers to [*details of an internal document revealing Atlantia's future business plans*].

²³⁹ Non-Horizontal Merger Guidelines, paragraph 103.

Vinci and Eiffage are integrated motorway concessionaires active in the distribution of OBE.

- (337) The second change is that drivers using motorway networks in different countries (Italy, Spain, France and Poland) would have post-Transaction the possibility to purchase ETS from one and the same entity. However, [*details of Atlantia's business strategy*]. Therefore, the Transaction does not have a significant impact on Atlantia's current ability to foreclose competitors through tying or bundling of Telepass' services. In addition, other providers of electronic toll payment services, such as Axxes and DKV, are competing to become major EETS providers, providing a single OBE and a single contract to the user of the European motorway network.
- (338) In view of the above, the Commission considers that the merged entity is unlikely to have the ability to foreclose competitors by tying or bundling its ETS with other payment services.

5.3.3.2. Incentive

- (339) The Commission has also assessed whether the merged entity would have an incentive to engage in such a strategy post-Transaction.
- (340) The merged entity is likely to have an incentive to engage in tying or bundling of Telepass' toll services with other payment services. Atlantia's internal documents demonstrate that (i) [*details of Atlantia's future business plans*];²⁴⁰ and (ii) post-Transaction, the merged entity intends to [*details of Atlantia's future business plans*],²⁴¹ [*details of Atlantia's future business plans*].²⁴²
- (341) As underlined by a respondent to the market investigation, "*with the merger, there is strong incentive to create one unified, bundled product which all their service providers as well as their combined concessions use. This product can support tolling in PT, FR, ES, Italy, Poland A4 as well as parking in Italy and France and access charge to Milan Area C*".²⁴³
- (342) In addition, this respondent to the market investigation notes that the use of toll payment contracts beyond the payment of tolls is authorised in the EEA, contrary to other non-EEA countries (such as Chile). Therefore, there is no regulatory

²⁴⁰ See e.g. Form CO, Annex 5.4.3.F, Presentation annexed to the Minutes of the meeting of Atlantia's Board of Directors of 16 September 2016, "Sistemi di pagamento". In particular, slides 42-43 refer to [*details of an internal document revealing Atlantia's future business plans*].

²⁴¹ Form CO, Annex 5.4.1.C, Presentation "Abertis Infraestructuras S.A: Deliberazioni inerenti e conseguenti", 12 May 2017. In particular, slide 9 refers [*details of an internal document revealing Atlantia's future business plans*] and slide 10 refers to [*details of an internal document revealing Atlantia's future business plans*].

²⁴² Form CO, Annex 5.4.1.C, Presentation "Abertis Infraestructuras S.A: Deliberazioni inerenti e conseguenti", 12 May 2017. In particular, slide 10: [*details of an internal document revealing Atlantia's future business strategies*].

²⁴³ Reply to question 42.1 of Q1 - Questionnaire to customers and competitors.

disincentive for the merged entity to offer payment services for motorway tolls and other services to its motorway users.²⁴⁴

- (343) The finding that the merged entity would have an incentive to engage in tying or bundling of electronic payment services for tolls and other mobility services is not, however, equivalent to a finding that the merged entity would have the incentive to foreclose competitors. In order to foreclose competitors, the merged entity would have to price its tied or bundled offers aggressively enough to weaken the competitive constraint exerted by rivals or even lead rivals to exit the market. As explained in section 5.3.3.3 below on the likely impact of a foreclosure strategy, the merged entity's rivals are unlikely to exit the market or to exert a lessened competitive constraint on the provision of other electronic payment services.
- (344) Therefore, it is uncertain that the merged entity would give the incentive to engage in a foreclosure strategy.

5.3.3.3. Likely impact on prices and choice

- (345) The Commission considers that a possible tying or bundling strategy by the merged entity with regard to electronic payment services would be unlikely to have a negative impact on prices and choice.
- (346) First, the share of customers addressable by the merged entity, i.e. users of Atlantia's and Abertis' electronic tolling services that also purchase electronic payment solutions for other mobility services, is currently limited. Even if this share is growing, it will remain marginal compared to the overall number of users of electronic payment services, even without considering the substitutability of electronic payment with the other payment modes (e.g. credit/debit card). Therefore, the fraction of payment services to be affected by foreclosure post-Transaction is unlikely to be sufficient for the tying or bundling strategy to lead to a negative impact on prices or choice.²⁴⁵ It is also unlikely that the merged entity's competitors willing to enter the market for other payment services and to offer bundled payment services would be deterred from doing so because they are unable to attract new customers.
- (347) Second, considering the limited costs for drivers associated with the switching of payment services, drivers would still be able to choose between stand-alone payment services and tied or bundled services offered by the merged entity. Therefore, a tying or bundling strategy is unlikely to lead to less choice for consumers.
- (348) Third, the merged entity will face the competition of strong players, which offer either stand-alone services (depending on the services to be paid) or bundled services. As examples, DKV and Total appear to offer bundles, combining cash-free fuel services (fuel cards) with OBE distribution, as well as other fleet services. It is unlikely that, due to the Transaction, they will lose so many

²⁴⁴ Reply to question 42.1 of Q1 - Questionnaire to customers and competitors.

²⁴⁵ Non-Horizontal Merger Guidelines, paragraph 113.

customers that they would have to exit the market or lose their ability or incentive to compete.

- (349) In view of the above, the Commission considers that a possible tying or bundling strategy by the merged entity would not have a negative impact on prices and choice of electronic payment services for mobility.

5.3.3.4. Conclusion

- (350) In view of the above, and considering all evidence available to it, the Commission concludes that, with regard to its conglomerate effects on the market for electronic payment services, the Transaction would not raise serious doubts as to its compatibility with the internal market.

5.4. Coordinated effects

- (351) In this section, the Commission will examine whether the Transaction may lead to coordination on the market for the transport on toll motorways or on the market for the provision of concession food services on motorway service areas, notably between Autogrill, controlled by Atlantia's largest shareholder, and Elixor, which co-controls Areamed together with Abertis.

5.4.1. *Atlantia's views*

- (352) Atlantia submits that there are no possible coordinated effects concerns, neither in the market for transport on toll motorway, nor in the market for the award of food concessions in motorways.²⁴⁶

5.4.2. *Commission's assessment*

- (353) The Commission considers that the structure of the markets for the management of toll motorways or food services sub-concessions are such as to make coordination unlikely, for the following main reasons: (i) competition between operators mainly, if not exclusively, takes place at the time of the grant of the motorway concessions and food services sub-concessions; (ii) the grant of those concessions or sub-concessions is highly regulated and occurs following open competitive procedures; (iii) the number of concessions to be granted is limited and their conditions (notably the investments and risk profiles) heterogeneous; and (iv) the terms of the bids are complex and difficult to compare.

- (354) The results of the market investigation do not provide elements that would substantiate the likelihood of coordinated effects brought about by the Transaction.

5.4.3. *Conclusion*

- (355) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market due to coordinated effects.

²⁴⁶ Form CO, paragraphs 247-248.

6. CONCLUSION

- (356) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Margrethe VESTAGER

Member of the Commission